BENJAMIN HARRISON

AMERICAN BAR ASSOCIATION JOVRNAL

SEPTEMBER 1943

The American Bar Association Journal is published Monthly by American Bar Association at 1140 North Dearborn Street, Chicago, Illinois
Entered as second class matter Aug. 25, 1920, at the Post Office at Chicago, Ill., under the Act of Aug. 24, 1912
Price: Per Copy, 25c; Per Year, $3; to Members, $1.50; To Students in Law Schools, $1.50. Vol 29, No. 9.

There is . . . "a time to laugh" . . .

Ecclesiastes 3:4

Self-Incrimination?

A lady, finding herself block leader (or captain) in the civilian defense lineup, set out one morning full of patriotic motives, to "wise up" her neighbors, in the matter of rationing and other OCD matters. She paused in due course at the front door of a family newly-arrived in the neighborhood.

Confronted by the lady of the house, she put on her best professional air, drew herself up to full dignity, and said impressively, "Good afternoon, I am the block head."

A Perfect Answer

Lawyer: "Now, sir, did you, or did you not, on the date in question, or at any other time, previously or subsequently say or even intimate to the defendant or anyone else, alone or with anyone, whether a friend or a mere acquaintance, or in fact, a stranger, that the statement imputed to you, whether just or unjust, and denied by the plaintiff, was a matter of no moment or otherwise? Answer me, yes or no."

Witness: "Yes or no what?"

A Keen Sense of Propriety

Four elderly Scots, remnant of a club formed some fifty years before, were seated around a table in their club room. It was 3 a. m. and Dougal looked across at Donald and said in a thick, sleepy voice:

"Donald, d'ye notice what an' awful peculiar expression there is on Jock's face?"

"Aye," was the reply, "I notice that; he's deead! He's been deead these four hours."

"What? Dead! Why did ye no tell me?"

"Ah, no-no-no. A'm no that kind o' man to disturb a convivial evening."

More Evidence of His Versatility

In his law office Joseph H. Choate was being interviewed by a certain well-known New York reporter. It was a warm June day, but Mr. Choate had a big fire burning in the grate.

The reporter began to squirm in discomfort.

"Do you think it is warm in here?" asked Choate, observing the other's restlessness.

"Warm?" replied the reporter, who had learned all he wanted to know from the great man and no longer had to pretend, "it's as hot as an oven."

"Indeed!" exclaimed Choate with a laugh. "But then it ought to be as hot as an oven, for, you see, I make my bread here."

TABLE OF CONTENTS

IN THIS ISSUE

Our Cover—Benjamin Harrison, twenty-third President of the United States, served in the Civil War 1862-1865 and was brevetted brigadier-general. George R. Farnum of Boston has written for this issue the tenth of his articles on JOURNAL cover-subjects, in which he presents an admirable view of Harrison.

Portrait from L. C. Handy Studios, Washington, D. C.

The Prize-winning Ross Essay—Professor Lester Bernhardt Orfield, a native son of Minnesota, former professor of law at the University of Nebraska, attorney for Social Security Board, Washington, D. C., in 1936, and member of the Supreme Court's Advisory Committee on Federal Rules of Criminal Procedure, writes on the subject, "What Should Be the Function of the States in Our System of Government?" This historic subject is considered in the light of war conditions and, therefore, is a real contribution to a topic which has been before the country since the beginning of its existence.

Bullets or Boycotts—Among the papers of the late Dean John H. Wigmore was discovered a partially-written article containing a proposal for the post-war world order. The Dean discusses the preferability and feasibility of international boycott to international police violence and suggests a means for making it effective. We are indebted to Professor Emeritus Albert Kocourek, Northwestern University School of Law, for the editing and completion of this timely article.

Improving the Administration of Justice—In an address delivered before the Maryland State Bar Association, Roscoe Pound, Harvard Law School, sets forth the causes of dissatisfaction with administration of justice according to law, and the reasons for the rise of adjudication by administrative agencies. Basing his observations on conditions obtaining in the State of Maryland, he commends improvements already made and suggests five points demanding attention in an effective program of improvement for the country as a whole.

ANNUAL TOPICAL INDEX

In Volume 62 of the American Bar Association Reports there was printed a complete index of subjects dealt with in the first 23 volumes of the JOURNAL. In Volume 65 of the Reports and subsequent volumes, topical indexes of Volume XXIV of the JOURNAL and of each succeeding volume, have been printed. Reprints are available at $1 each of the topical index of the first 23 volumes.

Tax Courses for General Practitioners—Weston Vernon, Jr., chairman of the Section of Taxation of the American Bar Association, outlines plans for the Association's sponsorship of a variety of tax courses in leading cities and by mail to be conducted by the Practising Law Institute of New York City.

Review of Supreme Court Decisions—In this issue we review the last of the decisions handed down by the Supreme Court of the United States in the term which ended June 21.

In *Direct Sales Company, Inc.* v. *U. S.*, it was held that conviction of conspiracy to violate the Harrison Narcotic Act cannot be reviewed merely on the doctrine of *U. S.* v. *Falcone.*

In *Boone* v. *Lightner* it was decided that the Soldiers' and Sailors' Civil Relief Act of 1940 does not fix an inflexible rule to govern in all cases the postponement of litigation during the term of military service.

In *Virginia Electric and Power Company* v. *NLRB,* it was held that the National Labor Relations Board may reimburse amounts deducted under a check-off system included in a collective bargaining agreement made between an employer and a company-fostered union.

In *McLeod* v. *Threlkeld,* it was held that a cook employed by a contractor to furnish meals to section hands of an interstate railroad is not within the scope of the Fair Labor Standards Act.

In *Owens* v. *Union Pacific Railroad Company,* the Court found it to be an error for an appellate court to reverse a judgment on a verdict for plaintiff, holding that the jury should determine the issue where the jury may find from the facts either assumption of risk by the employee, or contributory negligence.

In *ICC* v. *Inland Waterways Corporation,* the Court sustained the Interstate Commerce Commission's decision refusing permanently to suspend rate schedules on certain ex-barge grain.

In *Bartchy* v. *U. S.,* the Court held that Section 11 of the Selective Training and Service Act and Section 641.3 of the regulations do not require a registrant to remain at one place or to notify the local board of every move, provided a chain of addresses is supplied by which mail may be reasonably expected to reach him in time for compliance.

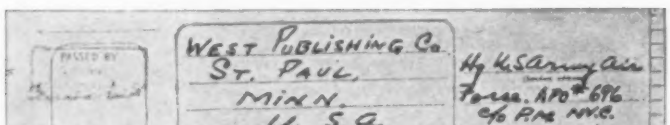
☆ ☆ ☆ ☆ ☆ ☆ ☆

"You're swell too — Colonel"

When we decided to supply all lawyers in the armed forces with the edited cases of their own Courts and those of the Supreme Court of the United States, we could not foresee that within the space of one year our weekly mailings would traverse the seven seas.

In the light of the sacrifices that these men are making, this service we are rendering fades into insignificance and becomes a high privilege to perform.

Typical of many letters received every day is the following from our Air Force Headquarters in the Middle East where history is being made:



West Publishing Co.
St. Paul,
Minn.
U. S. A.

Hq U.S. Army Air Force. APO 696 c/o P.M. N.Y.C.
April 5 '43

Somewhere in the Middle East

Gentlemen:

Many thanks for the 1943 Diary Book which finds an immediate & pressing use. Also the N.W. advance sheets which are read throughout, date lines, advertisements & everything by many of our news hungry men & which are a great refresher for me. You are "swell" to be so thoughtful of us! Yours truly,

V-MAIL

To avoid possible embarrassment names have been deleted from this facsimile, but the original occupies an honored place in our file of Servicemen's letters.

WEST PUBLISHING CO.

CURRENT EVENTS

George M. Morris Attends Conference Inter-American Bar

GEORGE MAURICE MORRIS, retiring President of the American Bar Association, has just returned from Rio de Janeiro, Brazil, where he attended the Second Conference of The Inter-American Bar Association. Mr. Morris addressed that notable gathering of the lawyers of the Americas on August 7. A report of this Conference will be made in a subsequent issue.

National Patent Planning Commission

THE recent report of the National Patent Planning Commission was the outstanding event for the year in the Patent, Trade-mark and Copyright Section. Shortly after Pearl Harbor, President Roosevelt appointed a Commission of five nationally known men "to conduct a comprehensive survey and study of the American patent system" in conjunction with the Department of Commerce.

The Commission worked on the project eighteen months before issuing its first preliminary report. The findings of the Commission were anxiously awaited because investments in this country based upon inventions are extensive. Any radical change in our laws tending to socialize patent property would not only affect these investments but would also retard our future industrial progress which has exceeded that of all other countries under our present laws for rewarding inventors.

The report is constructive and serves to clarify several matters. The Commission found "that existing laws permit the government of the United States and its contractors and subcontractors to manufacture and use any invention, patented or unpatented, regardless of the citizenship of the owner, upon the payment of reasonable compensation". These laws operate both in peace and in war. No emergency laws were deemed desirable in the present national crisis. The Commission also found that the American patent system was the best in the world. A number of changes of a technical nature were suggested.

Much of the time of the Section meeting in Chicago on August 23 and 24 was devoted to a discussion of the report and to changes in the present laws deemed desirable in the light of the Commission's findings. Some of the changes recommended by the Commission had already been advocated by the House of Delegates at the Detroit meeting last year. The attitude of the members of the Section toward the report was both cooperative and constructive. A number of recommendations were made which will appear in more detail in our next issue.

The most important bills pending in Congress relating to patents and trade-marks are the Kilgore Bill (S. 702) on patents and the Lanham Bill (H.R. 82) on trade-marks.

Remedial Legislation Needed

COUNSEL was recently appointed by a United States circuit court of appeals to represent the defendant in a complicated capital case. The appointment was accepted, and the case was argued and the conviction affirmed in a two to one opinion. A petition for certiorari filed by the appointed counsel was denied.

Counsel who acted in the case lived in the city where the accused had been tried and was in prison. Counsel was able without difficulty to confer with the prisoner. It was necessary, however, for counsel to attend the hearing in the circuit court of appeals several hundred miles away, and pay his own traveling expenses and other expenses incident to proper presentation of the case.

The senior circuit judge conferred with the Director of the Administrative Office of the United States Courts in an endeavor to ascertain if there was not some fund from which counsel could be reimbursed for these expenses and found that none was available. Clearly legislation is needed to remedy this situation.

A Lively Colloquy

THE August 7 issue of *Collier's Weekly* contains the following, which chronicles a reputed conversation between Mr. Justice William O. Douglas, of the Supreme Court of the United States, who has served on several committees to recommend the award of the Ross essay prize, and Chief Justice Simmons, of the Supreme Court of Nebraska, who is completing a notable survey for the Section of Judicial Administration:

> Ernest Haycox, the author, informs us that he was talking to Mr. Robert Simmons, Chief Justice of the Nebraska Supreme Court. And Justice Simmons had been talking to Mr. Justice Douglas of the United States Supreme Court. It's somewhat complicated. The Nebraska Supreme Court had just reversed a lesser state court basing its action on a prior decision by the big court in Washington. The case was then referred to the United States Supreme Court which proceeded to reverse its own prior ruling and, therefore, the Nebraska Supreme Court. Quite a mess, we'd say. Justice Simmons mentioned the matter to Justice Douglas. "Oh, yes," said Justice Douglas. "I remember. Your court's original mistake was in attempting to follow the reasoning of the United States Supreme Court." And Mr. Justice Simmons replied somewhat acidly: "That's true, sir. And it's a mistake which we shall not be likely to repeat."

WHAT SHOULD BE THE FUNCTION OF THE STATES IN OUR SYSTEM OF GOVERNMENT?

[Prize-Winning Ross Essay]

By LESTER BERNHARDT ORFIELD
Professor of Law, University of Nebraska (on leave)

I

THE ever-flowing stream of articles, bar association addresses[1] and adjudications concerning the position of the states in our constitutional system, may not unreasonably induce the feeling that little that is novel or significant remains to be said. Why ruin good white paper and use time which might be spent in winning the war? An answer is afforded by the man who had the key to the larger problem of the function of the nations in world organization, Woodrow Wilson: "The question of the relation of the states to the federal government is the cardinal question of our constitutional system. It cannot be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question."[2]

Lester B. Orfield

Not many thoughtful observers have concluded that federal systems are irremediably outmoded. One sharp critic has said: "In the political realm the most potent and assertive American ghost is still federalism. Most of its former functions have been stripped from it; it haunts a nation in which every force drives toward centralization, both economic and political."[3] Another writer states though with regret: "It is submitted that although the sun has not yet set on state sovereignty in the United States, the twilight of the states has begun."[4]

Though there is a popular impression that federalism is an ultra-modern concept, in fact so modern as to have been initiated by our Constitution without benefit of experience elsewhere, Professor McIlwain has produced evidence that during the medieval period England achieved a balance of central and local self-government.[5] The old relations of the Channel Islands, Ireland, Scotland and Wales to England show this. And about fifteen years before the Constitutional Convention of 1787, the issue, whether the British Empire was a unitary or a federal state, had been argued in a series of books and pamphlets published in the American colonies, by Adams, Dickinson and Wilson, the two latter of whom were members of the Constitutional Convention.[6]

Historically no one can question the importance of the states in our system of government. In fact, it was the underlying theory of the Articles of Confederation that the powers of the general government should be exercised through the state governments.

Nor can those who would abolish or devitalize the states look to the drafters of the Constitution for support. The choice in 1787 was not between federalism and unitary government but between federalism and confederation or no union at all. Thus even the most enthusiastic supporters of a stronger national government sought to prove that the powers to be given to

1. Thirty-six speeches are listed under the heading of "State rights" in *Index to State Bar Association Reports and Proceedings* (1942) p. 542.

2. Woodrow Wilson, *Constitutional Government in the United States* (1908) p. 173.

3. Max Lerner, "Minority Rule and the Constitutional Tradition," (1938) 86 U. of Pa. L. Rev. 457, 462. *See also* Stephen Leacock, "The Limitation of Federal Government," (1908) 5 Proc. Am. Pol. Sci. Assn. 37.

4. Edward A. Harriman, "The Twilight of the States," (1930) 16 A.B.A.J. 128, 129.

5. *Federalism as a Democratic Process* (1942) pp. 31-48. Compare the criticism by Francis W. Coker at pp. 76-82.

6. *See* Andrew C. McLaughlin, "The Background of American Federalism," (1918) 12 Am. Pol. Sci. Rev. 215; McLaughlin, *The Foundations of American Constitutionalism* (1932) chap. 6.

the national government were only such as were absolutely essential to its existence and continuance, that a national government was not dangerous, and that it need not be feared that it would constantly encroach upon the powers of the states. Hamilton wrote: "It will always be far more easy for the state governments to encroach upon the national authorities than for the national government to encroach upon the state authorities."[7]

The position of the states in 1787 has been accurately summarized by Frank J. Hogan in his presidential address to the American Bar Association: "When the Constitution was being considered it was manifest that the states were unwilling to surrender their sovereignty. They felt the need of a government stronger than the Confederation in certain fields of governmental action affecting the states generally, but they refused to delegate to a strong central government unrestrained control over their local affairs."[8]

To be sure, federal constitutions adopted subsequently to the Constitution of the United States have invariably committed more subjects to the national government. This has been true in Australia, Canada and South Africa. In South Africa the legislative power of the national government is unlimited as to subject matter, leaving to the states only such powers as are assigned to them by the national government. And recent amendments to our Constitution have limited the states, and not the federal government. On the other hand, neither the states in Australia nor the provinces in Canada are limited by any due process provision in their national constitutions. Moreover, the power of the Canadian provinces to regulate "property and civil rights in the provinces" has been held to be superior to the power of the national government to regulate trade and commerce, by both the Supreme Court of Canada and the Judicial Committee of the Privy Council. Australia, after twenty-five years' experience with its federal constitution, charged a Royal Commission with the examination of the working of its constitution. In 1929 this commission reported its adherence to the main principles underlying a federal system. In Canada the Royal Commission on Dominion-Provincial Relations recently sitting has not advocated that Canadian federalism be transformed into a unitary state. While Canada in 1867 took note of the weakness of the American system due to the wide authority asserted by the states and therefore restricted the provinces to defined powers and left the residuum of powers to the national government, Australia, in 1900, was more interested in preserving the autonomy of the states, and so modeled her constitution on ours of 1789.[9] The Privy Council of Great Britain, in finding the Canadian Capital Products Marketing Act to be beyond dominion competence, stated through Lord Atkin: "While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure."[10]

It may be thought that because some of the oldest and most democratic European countries manage to operate without state governments, we should be able to do so here. But the differences are greater than the resemblances. Compare, for instance, the area and density of population of the United States with that of the Netherlands. As Justice Frankfurter has stated: "Barring unique Switzerland, federalism is a response to size."[11] Compare also the racial homogeneity of the United States with that of Norway. Compare the religious situation in the United States with that in Sweden where more than ninety per cent of the people are not only Protestant but Lutheran. Compare the great differences in wealth between the various sections of the United States with the very even distribution of wealth in Denmark. When the states of the United States are compared with each other as to the degree of urbanization, industrialization, density of population, and per capita income, it must become evident that centralization is not the solution.[12]

II

It seems high time to reexamine the functions of the states when such authorities as Walter F. Dodd remind that: "Progress towards national control has been greater during the past seven years than during our whole history prior to that time."[13] Indeed, Justice McReynolds has lamented that recent constitutional decisions involve the transfer from the states and localities to the national government of "most if not all activities of the Nation."[14]

The protection of an unchanging group of state functions is not, however, to be sought in the Constitution of the United States. The Constitution nowhere lays down a sharp, visible line between national powers and state powers. The Tenth Amendment contains the only language which purports directly to deal with the distribution of powers among the people, the nation, and the states. Chief Justice Stone recently pointed out that:

"From the beginning and for many years the amendment has been construed as not depriving the national

7. *Federalist*, No. 17.

8. Frank J. Hogan, "Important Shifts in Constitutional Doctrine," (1939) 25 A. B. A. J. 629, 631.

9. Felix Frankfurter, *Mr. Justice Holmes and the Supreme Court* (1938) 69. Attorney General Herbert V. Evatt states: "The states still have general control over such important matters as the regulation of land, education, the administration of justice, health, housing, the regulation of employment and the provision of measures for the relief of unemployment." *See* "The Australian Way of Life," *Life*, February 1, 1943, p. 55.

10. *Attorney General for Canada* v. *Attorney General for Ontario* (1937) A.C. 326, 354.

11. Felix Frankfurter, *Mr. Justice Holmes and the Supreme Court*, (1938) p. 67.

12. Roscoe Pound, "The Constitution: Its Development, Adaptability and Future," (1937) 23 A.B.A.J. 739, 744.

13. Walter F. Dodd, "The Decreasing Importance of State Lines," (1941) 27 A.B.A.J. 78, 83. *See also* T. Jefferson Coolidge, "Remember the States," (January 1940) 165 *Atlantic Monthly* 89.

14. Dissenting opinion in *National Labor Relations Board* v. *Fainblatt*, (1939) 306 U. S. 601, 610, 59 Sup. Ct. 668, 673, 83 L. ed. 1014, 1021. *See also* Frank J. Hogan, "Important Shifts in Constitutional Doctrine," (1939) 25 A.B.A.J. 629, 637.

government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end."[15]

The states are thus limited by the grant of certain powers to the national government, eighteen of which are listed in Article I, Section 8. Moreover Article VI, Section 2, provides that "this Constitution and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution and Laws of any State to the Contrary notwithstanding."[16] Thus within the scope of its authority the national government is made supreme. The powers of the states to act without national interference are only those not within the authorized exercise of national power. "The states are in the position of a residuary legatee under a will—they take what is left after the determination of the scope of national power."[17] Before we can ascertain what these residual powers of the states are, we face the laborious task of fixing the scope of the powers delegated to the national government, powers delegated in the broadest terms. As from case to case these powers are made more definite and certain and, in fact, given broader meanings, as witness the treaty power, the power to tax, and the power to regulate commerce, simultaneously the powers of the states are made more definite and certain and in fact diminished. Decisions, the immediate effect of which is to confer broad power on the states, may shortly be followed by decisions conferring similarly broad power on the national government.[18]

III

Despite recent trends, how important the states are even with respect to federal functions may be immediately perceived from some statistics: States possessing less than twenty per cent of the population can defeat any Act of Congress. States possessing less than ten per cent of the population can defeat a treaty in the Senate. Finally, states possessing less than five per cent of the total population can defeat an amendment to the Constitution.

It should not be overlooked that much national legislation has its genesis in statutes passed by the states which have successfully experimented therewith. As Justice Brandeis pointed out: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[19] States have often pioneered in social and industrial legislation long before the national government became active as, for example, New York and housing.[20]

The states are, of course, vastly more significant with respect to their non-federal functions. They have the power to establish organized governments for the state, counties, towns, villages, and cities, subject only to the limitation that a republican form of government must be maintained. They have the power to regulate suffrage, except that discrimination because of sex or color is forbidden. They may lay and collect taxes. They have the police power under which they have sweeping powers as to keeping the peace, health, morals, and the common welfare, subject, however, to the due process and equal protection clauses of the Fourteenth Amendment. They occupy most of the field of education. They may regulate public utilities and create corporations. The field of private law, including family law and property law, is theirs to develop.

Many are quick to assume that because the national government has become extraordinarily active, state activities and functions must simultaneously be sloughed off. Yet, from one point of view, the states are vastly more important than they were at the beginning of our government. As Professor Munro says: "The idea that state governments shall confine themselves to a minimum of activity has long since passed into the discard. It has given place to the doctrine that these governments should busy themselves with all sorts of regulatory functions in the interests of the collective citizenship, no matter how much they constrain the freedom of the individual."[21] He further points out that "state functions are expanding, and to a certain extent constitutions must expand with them."[22] Walter F. Dodd concludes: "The powers taken over by the nation have been more than replaced by the new func-

15. *United States* v. *F. W. Darby Lumber Co.*, (1941) 312 U. S. 100, 124, 61 Sup. Ct. 451, 462, 85 L. ed. 609, 622, 132 A. L. R. 1430, 1442. *See also* A. H. Feller "The Tenth Amendment Retires," (1941) 27 A.B.A.J. 223.

16. Professor Strong ably points out that the Supremacy Clause may easily be given more weight than was contemplated by the drafters of the Constitution who desired that the Constitution, unlike the Articles of Confederation, should operate directly upon individuals and not merely on the states. "Cooperative Federalism," (1938) 23 Iowa L. Rev. 459, 473-474. The Supremacy Clause does not make the national government the legal sovereign. The legal sovereign is the amending power which is made up of both the national government and the states. Such sovereign may not act without the participation of the states and an extraordinary majority of them. The states are from this point of view equals with the national government. *See* Lester B. Orfield, *The Amending of the Federal Constitution*, (1942) c. V. entitled "Sovereignty and the Federal Amending Clause." For an interesting contention that the Supreme Court in performing its highly important function of maintaining the balance between the nation and the states has favored the national government, *see* Oliver P. Field, "State versus Nation and the Supreme Court," (1934) 28 Am. Pol. Sci. Rev. 241.

17. Walter F. Dodd, "The Decreasing Importance of State Lines," (1941) 27 A.B.A.J. 78, 79.

18. *E.g.* Price fixing as to milk by the states was upheld in *Nebbia v. People of New York*, (1934) 291 U. S. 502, 54 Sup. Ct. 505, 78 L. ed. 940, 89 A.L.R. 1469; and as to the national government in *United States v. Rock Royal Coop.*, (1939) 307 U. S. 533, 59 Sup. Ct. 993, 83 L. ed. 1446.

19. *New State Ice Co.* v. *Liebman*, (1932) 285 U. S. 262, 311, 52 Sup. Ct. 371, 386, 76 L. ed. 747, 771.

20. Julius Henry Cohen, " 'Government of the People, by the People, for the People' . . . Shall it Perish?" (1943) 29 A.B.A.J. 3, 4.

21. William B. Munro, "An Ideal State Constitution," 181 Annals (Sept. 1935) 1,3, part of a symposium on "The State Constitution of the Future."

22. *Id*, p. 4.

tions the states have assumed."[23] Such expansion has occurred not only through governmental regulation in fields hitherto unregulated but also through increasing control and supervision of the localities. In 1940 the states were providing more than one billion dollars in state aid to the localities or about twice the entire federal aid to the states.[24]

Movements to confer home rule on cities and more recently movements to confer such rule on counties strongly imply that there are many state functions left. If even these smaller units should have home rule as to certain matters, do not both common sense and logic call for it for the states with respect to matters more numerous and more important?

A picture of what might happen if the states were abolished demonstrates the indispensableness of the states. One writer has felt that "it is questionable whether the interests of the south and west would receive the consideration they now obtain."[25] Individual rights and privileges would be even more imperiled by a powerful centralized government. The existence of the states is a strong assurance that two political parties of fairly even strength will be permanently maintained. During the past decade even though one party had secured great majorities in Congress and a three-term President, fears that the nation had become a one-party country, like Germany and Italy, could always be dispelled by pointing to the states in which the other party either remained entrenched or quickly came to life again.

Strong state and local government is desirable from the point of view of the individual. As Chief Justice Hughes states, it is well that "the individual may have as direct a part as possible in the government of his life, a part which shall not be rendered inconsequential by the centralization of power."[26] The national government will also benefit since a citizenry is thereby trained which will hold the national government to an accounting. In short, whether viewed nationally by states or by localities, sturdy state governments will, as Hughes says, conserve "the interests of an ordered freedom."

The continued existence of the states is one of the best possible guaranties that we shall not have dictatorial government. Thomas Jefferson realized this full well when he said in his first inaugural address that one of the fundamentals of citizenship was "the support of the state governments in all their rights, as the most competent bulwark against anti-republican tendencies."[27] More recently, Roscoe Pound has said:

"All experience shows that a domain of continental extent has always been ruled either as an autocracy or as a federal government. What we have to think about, then, in this country is the alternative of an autocracy or a federal organized democracy. We set up a federal organization of democracies with the powers of politically organized society distributed between them and the federal government and within each a parceling out of its powers among separate departments. A federal government implies balance."[28]

No one more than Justice Brandeis has so repeatedly and emphatically stressed the harmful results of the concentration and centralization of business and industry.[29] That he felt much the same way about the centralization of government, may be inferred from a colloquy in the case upholding the validity of the Alabama Unemployment Compensation Law.[30] To an argument by the attorney against validity that "it would be infinitely better for all time in the future if the state was thrown on its own responsibility, rather than to accept the federal bounty at the price of surrendering the control of the local affairs and activities to the Federal Government," he responded: "That is a point on which I might agree with you; many would agree with you."

Some there are who have no confidence in the ability of the states and localities to govern themselves. The inspiriting answer is that given more than half a century ago by James Bryce: "A European may say that there is a dangerous side to this application of democratic faith in local majorities and in *laissez aller*. Doubtless there is; yet those who have learned to know the Americans will answer that no nation better understands its own business."[31]

IV

In examining claims that the national government has unduly encroached on the functions of the states, it is necessary, of course, to bear in mind a caveat by Justice Byrnes: "I venture to think, also, that henceforth the courts will exercise a healthy skepticism in hearing arguments that Congressional legislation has usurped the powers of the states. I say this because the charge of usurpation by Congress is generally not made by the states. It is made by special interests which are more concerned with escaping all control than preserving

23. Walter F. Dodd, *State Government*, (2nd ed. 1928) p. 55.

24. Joseph P. Harris, "The Future of Federal Grants-in-Aid," (January 1940) 207 Annals 14, 16-17 part of symposium, "Intergovernmental Relations in the United States;" "The Challenge to Local Government," University of Chicago Round Table, Nov. 29, 1942, p. 4.

25. John B. Cheadle, "Cooperation in Reverse: A Natural State Tendency," (1938) 23 Iowa L. Rev. 586, 616.

26. Charles E. Hughes, "Liberty and Law," (1925) 11 A.B.A.J. 563, 565. *See also* his more recent view expressed in his Address on the 150th Anniversary of the Constitution (1939) 25 A.B.A.J. 288.

27. Quoted by Clarence E. Martin, "The Growing Impotence of the States," (1933) 19 A.B.A.J. 547, 552.

28. Roscoe Pound, "The Place of the Judiciary in a Democratic Polity," (1941) 27 A.B.A.J. 133, 135. *See also* Hatton Sumners, "The Constitution Today," (April 1940) 26 A.B.A.J. 285, 367; *Federalism as a Democratic Process* (1942) p. 23; Vol. I, Bryce, *American Commonwealth*, (2nd ed.) p. 351.

29. *Liggett v. Lee*, (1933) 288 U. S. 517, 580, 53 Sup. Ct. 481, 502, 77 L. ed. 929, 85 A.L.R. 699; *The Curse of Bigness: Miscellaneous Papers of Justice Brandeis*, edited by Osmond K. Fraenkel (1934); *see* address by Attorney General Biddle at memorial proceedings for Justice Brandeis, (1942) 87 L. ed. Adv. Ops., 230, 63 Sup. Ct. XX.

30. *Carmichael v. Southern Coal and Coke Co.*, (1937) 301 U. S. 495, 57 Sup. Ct. 868, 81 L. ed. 1245, 109 A.L.R. 1327. The oral argument appears in Senate Document No. 53, 75th Congress, 1st Session, p. 16. *See also* Memorial address by Judge Learned Hand, (1943) 29 A.B.A.J. 67, 68.

31. Vol. I, Bryce, *American Commonwealth*, (2nd ed.) p. 341.

the control of the states."[32]

There may be considerable basis for the belief that the "states rights" doctrine has been used primarily in a negative fashion in opposition to a national bank, the protective tariff, territorial expansion, the abolition of slavery, the regulation of industry, federal aid, and protection of the public health.[33] Yet it seems manifest from what has been said and will be said in this essay that there is a valid core of truth in the "states rights" position. Men whose competence and intellectual integrity are beyond criticism have voiced it right up to the present moment.

In 1787 Thomas Jefferson said: "Let the national government be entrusted with the defense of the Nation, and its foreign and federal relations; the state governments with the civil rights, law, police, and administration of what concerns the state generally."[34] Alexander Hamilton, who might have been expected to favor restricting the functions of the states more than Jefferson would, nevertheless stated: "The administration of private justice between the citizens of the same state, the supervision of agriculture and of other concerns of a similar nature; all these things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction."[35]

Governor Albert C. Ritchie of Maryland insisted that the national government has only two broad powers, those with respect to foreign affairs so that a united attitude may be presented and those necessary to operate a government at home.[36] All other powers belong to the states. President Coolidge in 1925 opposed increases for grants-in-aid to the states. He stated: "Each state must shape its course to conform to the generally accepted sanctions of society and to the needs of the nation. It must provide a workable similarity of economic and industrial relations. It must protect the health and provide for the education of its own citizens."[37] President Hoover took much the same position, though as he freely conceded, some activities such as banking and finance, transportation, communications, and power had expanded beyond state borders.[38] T. Jefferson Coolidge, recent undersecretary of the Treasury, declares: "The education of the young, the care of the young and old, the sick and unemployed, the question of hours and wages of work, the conservation of soil of the farms, the housing of the citizens, the regulation of local utilities, and all the individual problems of the citizen must be handled by the individual states or the people thereof under the rule of elected officials responsible to them."[39]

It would be indicative of want of perceptiveness to assert that what were state functions in 1787, are now, and ever will be state functions. Roscoe Pound, no advocate of a unitary form of government, has pointed out that "with the increasing economic unification of the country, with the growth of enterprises and businesses transcending state lines, and with the advent of rapid transportation and instantaneous communication, (many) things that were local have become national."[40]

In deciding whether a given function is national or state today there are no absolute or single criteria. The historical test is of some assistance. Analytical criteria are also helpful. As Roscoe Pound puts it: "As everywhere else in law, experience developed by reason and reason tested by experience give us a practical working line answering its practical purposes. It is for professors to put the results in the order of reason in order to prevent the line from becoming arbitrary. But it is not for them to make arbitrary theoretical lines which will not stand the test of experience."[41]

The functions of the states are not nearly so political in character as those of the national government. As Governor Alfred E. Smith said to the New York legislature: "In the last analysis we will have to deal with but very few strictly political problems. The activities of the great corporation known as the State of New York are almost entirely concerned with the strictly business side of government and the welfare or human side."[42]

V

An experienced political scientist has enumerated the following state functions in order of importance: education, charities and correction, public health administration, labor law administration, agriculture, public works, supervision of corporations, militia and state police, state finance, and state personnel administration.[43]

Education. Walter F. Dodd points out that the "school system has become the most important single enterprise of state and local government."[44] Today education seems too large a problem for certain states, particularly those in the South, to cope with alone. The South faces the double burden of having proportionately more children to educate and less money with which to do

32. James F. Byrnes, "The Constitution and the Will of the People," (1939) 25 A.B.A.J. 547.
33. Briggs, "States Rights," (1925) 10 Iowa L. Bull. 297, 304.
34. Quoted by W. Brooke Graves, *Uniform State Action: A Possible Substitute for Centralization* (1934) 281.
35. Quoted by Graves at p. 282. *See* footnote 34.
36. Albert C. Ritchie, "State Responsibility" (1925) 11 A.B.A.J. 447.
37. Quoted by W. Brooke Graves, *Uniform State Action: A Possible Substitute for Centralization* (1934) 285. *See also* Walter F. Dodd, *State Government* (2nd ed. 1928) at 45; 67 Cong. Rec. 2670 (1926).
38. Address by the President of the United States, (1932) 57 A.B.A. Rep. 282, 286.
39. T. Jefferson Coolidge, "Remember the States," (January 1940) 165 *Atlantic Monthly* 89, 92.
40. *Federalism as a Democratic Process* (1942) 16. *See also* an address by Justice Reed, "The State Today," (1937) 15 Tenn. L. Rev. 52.
41. *Federalism as a Democratic Process* (1942) 21.
42. Quoted by William A. Robinson, "The Efficiency Problem in State Government." (1925) 11 A.B.A.J. 787.
43. Holcombe, *State Government in the United States* (1931) p. 378. *See also* Bromage, *State Government and Administration in the United States* (1936) c. 17; Walter F. Dodd, *State Government* (2nd ed. 1928). A roster of state administrative officials classified by functions in *The Book of the States*, Vol IV, 1941-1942, pp. 353-416, published by the Council of State Governments, lists fifty functions.
44. Walter F. Dodd, *State Government* (2nd ed. 1928) 563.

it.[45] For instance, in 1940 South Carolina had 589 children of school age for every thousand adults, while California had but 227. The total number of colored children in the South is greater than the number of children of all races or color in New England. During 1939-1940 the State of Mississippi spent $24 per pupil, or less than one-third of the national average and less than one-fifth of the New York average. The average salary for teachers in Mississippi was $559, while that in New York was $2,604. Moreover, many Southern children eventually migrate to northern states. About one-fourth of our people reside outside of the states of their birth. In time of war many Southerners may be too illiterate to be conscripted for the armed forces. As Congressman Ramspeck of Georgia has pointed out: "Out of the first 4,000,000 young men drafted for the armed services over 200,000 were *physically* fit, but *educationally* unfit for service."[46] State anxiety to match federal social security grants may mean smaller appropriations for education.

Senator Taft, on the other hand, has argued in reply that "education has always been a state and local function."[47] It would be unjust to have most of the $300,000,000 appropriated under S.1313 go to the thirteen southern states; Maryland, Massachusetts, and New York receiving nothing while Texas receives $23,000,000. Nearly half of all state appropriations are for education; hence, if the states cannot support even education they might as well be abolished. The making of such grants would give the national government control over the kind of education to be given in the states and localities.

General Relief. Imperatively calling for reexamination is the function of the states with respect to general relief. At the present time relief is administered through a highly decentralized system, involving more than ten thousand local units.[48] State participation in financing and administering is very limited or does not exist in a number of states. For instance, in 1940 in one-fourth of the states the state government supplied no financial support, while in several other states the financial support was very small. In ten states there was no state supervision; hence, the existence and extent of need was finally determined by local units. From May 1933 to 1936 relief was financed largely by federal funds.[49] Before and after, relief has been a state and local problem. In 1939 the total spent for general relief was $481,529,000.

General relief needs improvement not simply with respect to the relation between the states and their local units, but even more so with respect to the relation between the national government and the states. Deserving of serious consideration are the proposals in the Report of the Special Committee on Relief of the Council of State Governments.[50] This report proposes that general relief should be added as a category to the federal security program to be administered by the states, with some federal supervision and financing.[51] Work relief would be shifted from national to state administration. Federal grants to the states would vary among the states from a minimum of fifty to a maximum of seventy-five per cent. In determining the proportion, consideration would be given to such factors as: the volume of unemployment, the cost of living, and the per capita income in the state. This would avoid the unhappy situation with respect to grants for old age assistance, aid to the blind, and aid to dependent children under the Social Security Act, of large grants to the wealthy states and small grants to the poorer states so that the average payment to individuals in the latter states is pitifully small.

Labor. State labor laws have been of four types.[52] Minimum wages have been prescribed. Industrial relations have been regulated by laws modeled on the National Labor Relations Act and the Norris-LaGuardia Act; laws of the former type have sometimes added provisions defining and outlawing certain unfair labor practices on the part of workers.[53] The relation between national and state labor relations acts raises difficult questions which may ultimately require occupation of the whole field by a national act.[54] Industrial homework has been regulated and all states except Mississippi provide for workmen's compensation. It has been asserted by eminent authority that a national system of

45. "Federal Aid to Education," *The New Republic*, November 30, 1942, p. 701, vol. 107, No. 22. *See also* Arthur W. Macmahon, "Public Spending—With Strings," *Survey Graphic* (Nov. 1938) 542 at 544, pointing out that in 1930 the farmers of the nation, though receiving nine per cent of the national income, had 31 per cent of the children of the country to educate; Howard A. Dawson, "Should We Provide Federal Aid for Public Education?", American Forum of the Air, Sunday, December 13, 1942, p. 6.

46. "Should We Provide Federal Aid for Public Education?", American Forum of the Air, December 13, 1942, p. 4.

47. "Should We Provide Federal Aid for Public Education?", American Forum of the Air, Dec 13, 1942, p. 5. *See also* John W. Davis, "What Does the Constitution Mean to You?" (1925) 11 A.B.A.J. 442, 443. But for an argument that even college education should be regarded as a federal function *see* Alexander Meiklejohn, "The Future of Liberal Education," Jan. 25, 1943, *The New Republic*, 113, 115: "Some way must be found to send surging through the irresponsible scholarship of our professors the driving force of our national purpose, our national devotion to freedom and equality."

48. *Book of the States*, Vol. IV, (1941-1942), pp. 176-182, "The Administration of General Relief in the States During 1940."

49. Federal District Judge Charles E. Wyzanski stated in his oral argument in *Charles C. Steward Machine Co.* v. *Davis*, (1937) 301 U. S. 548, 57 Sup. Ct. 883, 81 L. ed. 1279, published in Senate Document No. 53, 75th Congress, 1st Session, at p. 88: "From 1933 to July 1, 1936, the states supplied $689,000,000, local subdivisions supplied $775,000,000 and the federal government supplied just for direct relief, $2,929,000,000, two-thirds of the total."

50. *Book of the States* Vol. IV, 1941-1942 p. 23. *See also* William Hodson "Federal Aid for General Relief," (Sept. 1942) 32 Am. Lab. Leg. Rev., No. 3, pp. 103-104.

51. As in the case of education the eagerness of the states to match federal social security grants has likely meant less appropriations for general relief. *See* Joseph P. Harris, "The Future of Federal Grants-in-Aid" (January 1940) 207 Annals 14.

52. *Book of the States*, Vol. IV, (1941-1942) pp. 206-210.

53. Smith and DeLancey, "The State Legislatures and Unionism," (1940) 38 Mich. L. Rev. 987.

54. Gerald Heaney, "Labor Relations—a National or a State Problem," (1942) 26 Minn. L. Rev. 359, 386. The administration of such act should, however, be decentralized. In February 1943 the National War Labor Board divided the nation into twelve regions in order to decentralize its work.

workmen's compensation would not have been as satisfactory as leaving the question to the states.[55]

The regulation of child labor is seemingly a state function.[56] The states should lay down standards with respect to minimum age, hazardous occupations, maximum daily hours, maximum weekly hours, night work, and work certificates.[57] "During more than twenty-five years, the (American Bar) Association has sponsored and urged state legislation to lessen the abuses of child labor."[58]

Housing. Prior to 1926 there were no effective housing laws other than those of a regulatory type. During the period 1933-1939 thirty-eight states passed enabling legislation to establish local public housing agencies to finance, construct and operate housing accommodations for families of low income.[59] The states and the cities, however, did not take the initiative but left it to the national government.[60] And it has been pointed out that the "federal housing program now in process pays lip service to decentralization, but in fact centralizes control in the hands of a national agency."[61]

Insurance. In 1868 the Supreme Court of the United States held that insurance was not commerce.[62] This threw the subject into the hands of the states, though it has been pointed out that it is difficult for insurance companies to have to comply with forty-eight different sets of rules, with a resultant increase in the cost of insurance.[63] The Section of Insurance Law of the American Bar Association conducted a symposium on "Federal Regulation of Insurance" at its 1940 meeting.[64] It was pointed out that in Canada there had been dual supervision by the dominion and provincial governments for seventy years while this country had never had federal supervision. The dominion government, however, simply examined for solvency the companies doing business in more than one province; everything else was left to the provinces. Senator O'Mahoney, Chairman of the Temporary National Economic Committee, emphatically denied that the committee had ever recommended or even suggested the passage of legislation providing for federal regulation of insurance. In the event that Congress should pass such legislation, it has been pointed out that "Through distinctions and reversals which will find support in recent decisions of the United States Supreme Court, the whole field of insurance may be brought under federal control through the commerce and postal powers."[65]

Criminal Law. Former Attorney General Mitchell has pointed out that the federal government has been assuming criminal jurisdiction once formerly assumed by the states in prosecuting the receipt of stolen goods, racketeering, kidnapping, and fraud. The Eighteenth Amendment aggravated this condition with the consequence that from July 1929 to July 1931 the number of federal prisoners increased from 24,000 to 42,000. He concludes, "The solution of our crime problem under our constitutional system is one for cities, counties, and states."[66]

President Hoover forcefully stated his belief that the administration of the criminal law is a state function rather than a national. He said: "The facts of most crimes are localized; they must be investigated at the scene; the pursuit of the criminal must be directed from the community whose peace has been broken; and the evidence for his trial can most effectively and most justly be presented to his neighbors and judges in that community. Thus, in spite of the fact that crime also has frequently become interstate, the suppression of crime is still most effectively accomplished locally, and fundamentally must remain the responsibility of the state and local governments, and should not be shifted to the federal government."[67]

Even though it be granted as one writer states that "crime control is one of the activities of government centered primarily in the states and their local subdivisions,"[68] it does not follow that there should not be a great deal of cooperation. Informal cooperation has long existed through conference, joint action of state and federal officials, the setting up of research and information services for reciprocal use, and the use of the

55. Walter F. Dodd, "The Decreasing Importance of State Lines," (1941) 27 A.B.A.J. 78, 84; Dodd, "Adjustment of the Constitution to New Needs," (1936) 22 A.B.A.J. 126, 130.

56. *See Bailey* v. *Drexel Furniture Co.*, (1922) 259 U. S. 20, 36, 42 Sup. Ct. 449, 450, 66 L. ed. 817, 819, 21 A.L.R. 1432. *See* Clarence E. Martin, "The Growing Impotence of the State," (1933) 19 A.B.A.J. 547, 549. The failure of the states after 1918 to enact legislation measuring up to the standards set by the Congressional Act of 1916 shows the lack of unanimity with respect to state policy. *See* Frank R. Strong, "Cooperative Federalism," (1938) 23 Iowa L. Rev. 459, 483-486. It was stated prior to the 1941 decision in *United States* v. *F. W. Darby Lumber Co.* 312 U. S. 100, 61 Sup. Ct. 451, 85 L. ed. 609, 132 A.L.R. 1430, that the sustaining of the Fair Labor Standards Act would make unnecessary a child labor amendment to the constitution. Walter F. Dodd, "The Decreasing Importance of State Lines," (1941) 27 A.B.A.J. 78 at 80.

57. *Book of the States,* Vol. IV, (1941-1942) p. 210.

58. "Information as to Referendum Upon Child Labor Amendments and Legislation," (1937) 23 A.B.A.J. 819, 822.

59. *Book of the States,* Vol. IV, (1941-1942) pp. 218-219, "The States' Role in Housing;" McDougal and Mueller, "Public Purpose in Public Housing," (1942) 52 Yale L. J. 42; *note* (1941) 26 Minn. L. Rev. 81. *See also* Dorothy Schaffter, *State Housing Agencies* (1942).

60. "The Challenge to Local Government," University of Chicago Round Table, November 29, 1942, p. 12.

61. Walter F. Dodd, "The Decreasing Importance of State Lines," (1941) 27 A.B.A.J. 78, 84.

62. *Paul* v. *Virginia,* 8 Wall. (U. S. 1868) 168.

63. Harry Hubbard, "Too Many Governments" (1924) 10 A.B.A.J. 207; Stephen Leacock, "The Limitations of Federal Government," (1908) 5 Proc. Am. Pol. Sci. Assn. 37.

64. *See* (1940) 26 A.B.A.J. 900-913.

65. Walter F. Dodd, "The Decreasing Importance of State Lines," (1941) 27 A.B.A.J. 78, 81. *See also* Sigmund Timberg, "Insurance and Interstate Commerce," (1941) 50 Yale L. J. 959; Nehemkis "Paul v. Virginia, The Need for Re-examination," (1939) 27 Geo. L. J. 519.

66. William D. Mitchell, "The Abdication by the States of Powers under the Constitution," (1931) 17 A.B.A.J. 811, 814. *See also* Attorney General Daugherty, "The Cooperative Duties of the States and the Federal Government," (1922) 71 U. of P. L. Rev. 1. But for the contention that if the states are to avoid impotence they must improve criminal law enforcement, *see* Clarence E. Martin, "The Growing Impotence of the States," (1933) 19 A.B.A.J. 547, 549.

67. Address by the President of the United States, (1932) 57 A.B.A. Rep. 282, 288.

68. Jane Perry Clark, *The Rise of a New Federalism* (1938) p. 13.

educational facilities of one government by the other.[69] Possibly the national government should make grants-in-aid to the states.[70] The power of Congress to regulate interstate commerce has been the basis of much recent federal criminal legislation.[71]

The experience with the Eighteenth Amendment would seem to indicate that prohibition of alcoholic liquor is a state and not a national function. The words of Federal Judge John J. Parker may fittingly be applied to this question: "It is easy to plan nation-wide reforms by national legislation; but experience has taught us the danger of exerting national power in local matters where local opinion does not support the exercise of such power."[72]

Civil Law. Proof of the importance of the states in the development of law may be found in the statement of Walter F. Dodd: "The states have legislated in new fields earlier and more vigorously than has Congress. This has been true because the states have had a wider field in which to legislate, and changes in the legal system have had to come primarily through state legislation."[73]

Justice Black has recently stressed the importance of the states in developing the law through judicial decision. He points out that the *Erie Railroad* case, "in line with the best trends in American thought, extends democracy further into law by returning the task of law fashioning to the largest possible group in the society, the group which is closest to the people. The many state courts are given a larger responsibility in the development of the common law."[74] Congress has not and cannot declare substantive rules of common law applicable in a state, hence the federal courts cannot, merely because they happen to have jurisdiction, assume a power which Congress could not give them. This means that contract and tort law development is largely entrusted to the states. Thus are the states challenged to make critical reappraisals of the condition of their legal systems.

Supervision of Localities. An increasingly important state function is the adjustment of the relation between state and local authorities. In fact, since the local governments are but agents of the states, the states have a much freer hand to control and supervise the localities than does the national government with respect to the state governments.[75] The states in exercising this function are called upon to reconcile the right of the people in the localities to manage their own affairs and the right of the people of the whole state, also, to manage their affairs. The states must make up their minds whether they want complete state centralization, extension of state supervision or a partial centralization, county consolidation or state regionalism, a reduction in the number of the local units, or simply reorganization of the machinery of existing local government.

Taxation. At a date not very distant, the function of taxation is likely to become a bone of contention between the national and state governments. In 1913 twenty-four per cent of all taxes were collected by the national government, eleven by the state governments and sixty-five by the local governments, whereas it has been estimated that in 1942 the national government would collect fifty-six per cent, the states twenty-two, and the local governments twenty-two.[76]

Justice Jackson pointed out in 1937: "The resources of the states have been declining. Real estate, reserved to the states as a source of taxation, has been taxed to the limit of its capacity to bear, and personalty has never been successfully taxed locally. The federal government, which is able to tax incomes and to lay excises, has sources of revenue which have been drying up for the states, not because of any change in the legal system but because the economic emphasis on personal property has left the states without a comparative source of revenue such as they had at the beginning of our constitutional system."[77]

Recent developments in Canada and Australia may afford a pattern for the United States. The Report of the Royal Commission on Dominion-Provincial Relations recommended that the Canadian national government assume the financing and administration of such social services as unemployment insurance and relief, that such government take over existing and future provincial debts if approved by a Dominion Finance Commission, that the national government have the sole right to levy income and corporation taxes (now levied by both governments), that the national government take over inheritance taxes (now levied only by the

69. A. Millspaugh, *Crime Control by the National Government* (1937).

70. P. H. Sanders, "Federal Aid for State Law Enforcement," (1934) 1 Law & Contemp. Prob. 472.

71. John Dickinson, "Crime and the Constitution," (1935) 21 A.B.A.J. 739; *note*, "Federal Cooperation in Criminal Law Enforcement," (1935) 48 Harv. L. Rev. 489.

72. John J. Parker, "National Government Must Be Supported By Local Opinion," (1940) 26 A.B.A.J. 52, 54. *See also* J. P. Chamberlain, "Enforcement of the Volstead Act Through State Agencies," (1924) 10 A.B.A.J. 391, 394; Robert M. LaFollette, Jr., "Prohibition Never More," (January 1943) 171 *Atlantic Monthly*, p. 37.

73. Walter F. Dodd, "Implied Powers and Implied Limitations in American Constitutional Law," (1919) 29 Yale L. J. 137, 161.

74. Black, Address to Missouri Bar Association (1942) 13 Mo. Bar J. 173, 175. *See also* Walter P. Armstrong, "Increasing Importance of State Supreme Courts," (1941) 28 A.B.A.J. 2.

75. The southern states exercise very wide control as to road administration, school support, policing, public welfare, and local finance. Paul W. Wager, "State Centralization in the South," (January 1940) 207 Annals 144.

76. Robert M. Kamins, "Impact of War Upon Federal Tax Structures," (1942) 20 Taxes 481, 482.

77. Oral Argument in *Helvering et al* v. *Davis* (1937) 301 U. S. 619, 57 Sup. Ct. 904, 81 L. ed. 1307, Senate Document No. 71, 75th Congress, 1st Session, p. 19.

78. 1 Report of the Royal Commission on Dominion-Provincial Relations (1940) p. 202 *et seq.* For a helpful review of this report *see* Jane Perry Clark (1941) 27 A.B.A.J. 190; Robert M. Kamins, "Impact of War Upon Federal Tax Structures," (1942) 20 Taxes 481, 483. With respect to the analagous Graves-Edmunds plan in this country *see* W. Brooke Graves, "Influence of Congressional Legislation on Legislation in the States," (1938) 23 Iowa L. Rev. 519, 528; Jerome R. Hellerstein and Edmund B. Hennefeld, "State Taxation in a National Economy," (1941) 54 Harv. L. Rev. 949, 974.

provinces), that in return, the national government make grants to the provinces to bring education and welfare up to national standards, and that permanent arrangement be made for regular conferences between the national and provincial governments.[78] In Australia the national government has occupied the entire field of income taxation.[79]

VI

It appears from the foregoing paragraphs that there is no consensus of opinion as to whether education, general relief, labor, housing, criminal law administration, and taxation, are state or national functions or both. This strongly suggests that the basic function of the states in our system of government should be cooperation with the national government. "The alternative of centralization is efficient cooperation."[80]

It would be hazardous to venture a complete listing of cooperative techniques.[81] The most important would seem to be as follows: (1) uniform legislation;[82] (2) reciprocal legislation;[83] (3) state legislative petitions to Congress; [84] (4) conferences of governors and other state officials; [85] (5) interstate compacts; [86] (6) auxiliary legislation by Congress under its commerce power; [87] (7) federal utilization of state administrative agencies; [88] (8) grants-in-aid; [89] and (9) tax credits.[90]

According to Professor Corwin it is "national-state cooperation, effected by means of the federal grant-in-aid, which best realizes the ideal of cooperative federalism."[91]

Justice Jackson has pointed out that the most important recent development with respect to cooperation between the national and state governments is the decision sustaining the unemployment insurance tax credit. The idea of cooperative federalism has now replaced that of dual federalism. As a consequence of that case the governments today have the "greatest power in the history of the country to cooperate."[92]

Effective cooperation requires the sustained support of our citizens. As Justice Frankfurter has said: "Of all the means for ordering the political life of a nation, a federal system is the most complicated and subtle; it demands the most flexible and imaginative adjustments for harmonizing national and local interests."[93]

---

79. Robert M. Kamins, "Impact of War Upon Federal Tax Structures," (1942) 20 Taxes 481, 484; *see* Report of the Royal Commission on the Constitution, Parliament of the Commonwealth of Australia (1939) p. 187 *et seq.* The validity of ousting the states was sustained in *South Australia and Others* v. *The Commonwealth and Another* (Aug. 14, 1942) 16 Aust. L. J. 109.

80. Roscoe Pound, "Cooperation in Law Enforcement," (1931) 17 A.B.A.J. 9.

81. *See* for attempts, Ernst Freund, *Legislative Regulation* p. 143; Roscoe Pound, "Cooperation in Enforcement of Law," (1931) 17 A.B.A.J. 9; W. Brooke Graves, *Uniform State Action: A Possible Substitute for Centralization* (1934); Frankfurter and Landis, "The Compact Clause of the Constitution—A Study in Interstate Adjustments," (1925) 34 Yale L. J. 685, 688-691; Louis W. Koenig, "Federal and State Cooperation Under the Constitution," (1938) 36 Mich. L. Rev. 752; Clark, *The Rise of a New Federalism* (1938).

82. George B. Young, "Uniform State Laws," (1922) 8 A.B.A.J. 181, 182; J. P. Chamberlain, "Uniformity of Regulatory Laws through Federal Models," (1923) 9 A.B.A.J. 382; James F. Ailshie, "Limits of Uniformity in State Laws," (1927) 13 A.B.A.J. 633; William D. Mitchell, "Uniform State and Federal Practice," (1938) 24 A.B.A.J. 367; Charles E. Clark, "The Proper Function of the Supreme Court's Federal Rules Committee," (1942) 28 A.B.A.J. 521, 524-525; Rodney L. Mott, "Uniform Legislation in the United States," (1940) 207 Annals, p. 79.

83. Concurring opinion by Justice Frankfurter in *State Tax Commission of Utah* v. *Aldrich*, (1942) 62 Sup. Ct. 1008, 1013, 86 L. ed. Adv. Ops. 911, 917; Joseph R. Starr, "Reciprocal and Retaliatory Legislation in the American States," (1937) 21 Minn. L. Rev. 371; Brady, "Death Taxes—Flat Rates and Reciprocity," (1928) 14 A.B.A.J. 309; Lindsay, "Reciprocal Legislation," (1910) 25 Pol. Sci. Q. 435.

84. Margaret W. Stewart, "State Advice on Federal Legislation," (1933) 19 A.B.A.J. 521.

85. *See* Jane Perry Clark, *The Rise of a New Federalism* (1938), c. II; W. Brooke Graves, *Uniform State Action: A Possible Substitute for Centralization* (1934) 85.

86. Felix Frankfurter and James W. Landis, "The Compact Clause of the Constitution—A Study in Interstate Adjustments" (1925) 34 Yale L. J. 685; Francis C. Wilson, "Interstate Compacts Under the Constitution—Past Uses and Future Possibilities," (1932) 57 A.B.A. Rep. 734; A. A. Bruce, "The Compacts and Agreements of States with One Another and with Foreign Powers," (1918) 2 Minn. L. Rev. 500.

87. Kallenbach, *Federal Cooperation with the States under the Commerce Clause* (1942); Frank R. Strong, "Cooperative Federalism" (1938) 23 Iowa L. Rev. 459; Laporte and Leuschner, "Extending State Jurisdiction by Act of Congress," (1929) 15 A.B.A.J. 199.

88. Holcombe, "The States as Agents of the Nation," (1921) 1 Southwestern Pol. Sci. Q. 307; J. P. Chamberlain, "Enforcement of the Volstead Act Through State Agencies," (1924) 10 A.B.A.J. 391; Wayne B. Wheeler, "Use of State Agencies in Aid of Discharge of Federal Functions," (1926) 99 Cent. L. J. 222; Barnett, "Cooperation Between the Federal and State Governments," (1928) 7 Ore. L. Rev. 267.

89. Joseph P. Harris, "The Future of Federal Grants-in-Aid," (January 1940) 207 Annals, 14; McDonald, *Federal Aid* (1928); Paul Douglas, "The Development of a System of Federal Grants-in-Aid," (1920) 35 Pol. Sci. Q. 255, 522; Charles K. Burdick, "Federal Aid Legislation," (1923) 8 Corn. L. Q. 324; V. O. Key, Jr., *The Administration of Federal Grants to States* (1937); *Note*, (1940) 34 Am. Pol. Sci. Rev. 489.

90. E. M. Perkins, "State Action Under the Federal Estate Tax *The Rise of a New Federalism*, (1938), c. IX; A. W. Machen, Credit Clause," (1935) 13 N. C. L. Rev. 271; Jane Perry Clark, "The Strange Case of Florida v. Mellon" (1928) 13 Corn. L. Q. 351; Barbara N. Armstrong, "The Federal Social Security Act," (1935) 21 A.B.A.J. 786, 794.

91. Edward S. Corwin, "National-State Cooperation—Its Present Possibilities," (1937) 46 Yale L. J. 599, 623.

92. Robert H. Jackson, quoted in " 'Narrow Legalism' Scored" (1940) 26 A.B.A.J. 594. He stated in his oral argument in *Steward Machine Co.* v. *Davis* (1937) 301 U. S. 548, 57 Sup. Ct. 883, 81 L. ed. 1279, published in Senate Document No. 53, 75th Congress, 1st Session, at p. 100: "This unemployment compensation plan is perhaps the most extensive effort at federal and state cooperation that has ever been undertaken in the United States." At p. 121 he stated: "The difficulty with federation has always been its lack of cooperation among the parts, as the difficulty with unitary government has always been the lack of adaptation to the locality. And there is no reason why, if state and federal government may lay their powers side by side and work together, they may not achieve the advantages of both systems of government." *See also* Justice Reed, "The State Today," (1937) 15 Tenn. L. Rev. 52, 59; and Chief Justice Hughes in *United States* v. *Bekins*, (1938) 304 U. S. 27, 53, 58 Sup. Ct. 811, 816, 82 L. ed. 1137, 1144.

93. Felix Frankfurter, *Mr. Justice Holmes and the Supreme Court* (1938) 75.

DISTINGUISHED SPEAKERS AT ANNUAL MEETING

MEMBERS attending the Sixty-sixth Annual Meeting of the American Bar Association held in Chicago, August 23-26, welcomed distinguished visitors.

The Attorney General of England, The Right Honorable Sir Donald Bradley Somervell, O.B.E., M.P., K.C., spoke at the fourth session of the Assembly and also at the annual dinner.

Sir Donald was educated at Harrow and at Magdalen College, Oxford. He took first-class honors in natural science (chemistry) in 1911 and became a Fellow of All Souls in the following year. In 1933, he married Laelia Buchan-Hepburn, the daughter of Sir Archibald Buchan-Hepburn.

He successfully contested the parliamentary constituency of Crewe in Cheshire in October, 1931, when his majority was 6,790. He came into prominence as one of the most effective debaters among the younger Conservative members by a speech in the debate in the House of Commons, February, 1933, on the Government's policy in India, when he strongly supported the attitude of the Secretary of State.

Sir Donald was called to the Bar by the Inner Temple in 1916, but his career was interrupted by the first World War, in which he served with the 9th Middlesex Regiment in India and in Mesopotamia. Soon after taking up practice in 1919, he acquired a great reputation for his handling of commercial cases. After he took "silk" (became a King's Counsel) in 1929, he was counsel in the majority of big law suits, especially those involving insurance and sale of goods. He was knighted in 1933 on his appointment as Solicitor General, which office he held until he was named Attorney General in 1936. As Attorney General, he has taken part in all leading cases in which the British Government has been concerned. While the greater part of his work has been in the field of taxation, Sir Donald has also appeared, on behalf of the Crown, in cases involving murder, fraud and international law. He was made a Privy Councillor in 1938 and has been recorder of Kingston-on-Thames since 1940.

THE RIGHT HONORABLE SIR DONALD BRADLEY SOMERVELL
The Attorney General of England

The Attorney General has fulfilled these many duties in outstanding fashion for seven years. He has, as well, found time to support the cause of law reform and discharged with success the many duties of a public man. His personal charm and liberal outlook have made him an exceptionally popular and admired member both of the House of Commons and of the legal profession.

During the present war, in addition to dealing with technical legal matters, Sir Donald has spoken on behalf of the Government in the House of Commons to urge the passage of several Bills of great social or international significance. In December, 1940, when "the blitz" was at its height, he helped conduct through the House the War Damage Bill, designed to give compensation to the many in the United Kingdom whose homes and belongings were being destroyed by enemy action. Later, in 1941, he spoke supporting the Liabilities (War-Time Adjustment) Bill, which gives protection to those British business men who suffer financial difficulties as a result of war conditions. In 1942, he helped guide through the House the United States (Visiting Forces) Bill, which confers on the United States authorities complete jurisdiction over all American soldiers in Britain, to

SIR OWEN DIXON
The Australian Minister to the United States

the exclusion of the British courts. While dealing with this Bill he explained to the House some of the provisions of the American Articles of War.

Sir Owen Dixon, Australian Minister to the United States, whose presence at last year's annual meeting in Detroit made his visit this year all the more pleasurable, addressed a luncheon meeting of the Section of International and Comparative Law.

From 1929 to 1942, Sir Owen served as Justice of the High Court of Australia, and is still a member of that court on leave for the discharge of his present ministerial duties.

He was born April 28, 1886 and was educated at Hawthorn College, Melbourne, and at the University of Melbourne, receiving the degree of B.A. in 1906; LL.B. in 1908; and M.A. in 1909. He was called to the Bar in Victoria in 1910; made King's Counsel in 1922; and Acting Judge of the Supreme Court of the State of Victoria in 1926.

Honorable C. Campbell McLaurin, Justice of the Supreme Court of Alberta, representing the Canadian Bar Association, made an address at the third session of the Assembly on Wednesday, August 25.

Mr. Justice McLaurin, son of the Reverend C. C. McLaurin, Baptist minister and Superintendent of Missions, Western Canada, was born in Sarnia, Ontario, September 1, 1893. He was educated in the Alberta public schools, Calgary Normal and Alberta University, receiving his LL.B. degree from the latter in 1922. He served in the Canadian Army in World War I.

Mr. Justice McLaurin practiced in Calgary, specializing in corporation and insurance law. He unsuccessfully contested the West Calgary constituency in 1930 against Honorable R. B. Bennett, P. C., Prime Minister of Canada, 1930-1935. He was appointed Kings Counsel in 1935 and to the Supreme Court of Alberta on September 25, 1942. He is vice president for Alberta of the Canadian Bar Association.

Distinguished members of the bar of the United States interrupted their arduous wartime duties to bring messages of importance to the lawyers assembled for this meeting. Among them were Honorable Wiley B. Rutledge, Jr., Associate Justice of the Supreme Court of the United States; Major General Myron C. Cramer, Judge Advocate General of the United States Army; Brigadier General Cornelius W. Wickersham, Commandant of the School of Military Government, Charlottesville, Virginia; Honorable J. William Fulbright, Member of Congress from Arkansas; Honorable Robert A. Taft, United States Senator from Ohio; and Honorable Robert M. Hutchins, President of the University of Chicago.

HONORABLE C. CAMPBELL McLAURIN
Justice of the Supreme Court of Alberta

BULLETS OR BOYCOTTS

Which Shall be the Measure to Enforce World Peace?

By JOHN H. WIGMORE*

[*Prefatory Note.* Through the diligence of Miss Sarah B. Morgan, for many years Dean Wigmore's secretary, there has been found a short unfinished ms. in Dean Wigmore's characteristic hand dealing with an important problem of world peace. Mrs. Wigmore has graciously given her consent to the publication of this fragment.

It will be recalled that within the present year Dean Wigmore had published a volume entitled *A Guide to American International Law and Practice.* For several years he gave a course in International Law and it may also be recalled that in 1930 he was nominated for a seat in the Permanent Court of International Justice. Dean Wigmore displayed a keen interest in international law and he was deeply interested in the kind of problems that necessarily must arise at the end of the present war. Since he was a personality of world-wide fame, it can not be doubted that anything he had to say on this subject is of first-rate importance and value.

It is possible that his solution of the world peace problem, if adopted, will turn the tide and mark a new era in international life. For centuries philosophers, jurists, and political scientists have considered the problem of world peace. Many have considered peace treaties as mere pauses between wars. Other have regarded war as belonging to the order of nature as a biological necessity. Some, like Francis Bacon, regarded foreign wars as beneficial for the sound health of the body politic. In recent years there have not been many optimists although hundreds of plans for a condition of perpetual peace have been put into print. Man has lived on this planet for perhaps a million years and recorded history nowhere has exhibited a concrete solution of this great problem.

Since the Napoleonic wars the results of peace treaties have, it would seem, driven the hope of a permanent solution deeper into the background. This may be due to the fact that before the rise of industry and world commerce the ideas of what the French call *chevalerie* and what the Japanese call *bushido* played a large part in war settlements. Indeed, a recent writer (Bernanos, *Lettre aux Anglais*) says that unless this idea comes again to prevail "the last chance of the world will be gone." Perhaps this idea will be the limiting condition of the success of Dean Wigmore's proposal.

The idea of boycott as a peace-preserving measure, of course, is not new. Much could be written on its failure to function as an inducement to peace. But the idea of an organized boycott by a dominant group of states supported by a system of insurance, is, we believe, entirely new. If it should happen to be adopted, and succeeds in actual practice, it will be rated as one of the most important contributions to the welfare of the human race of all time. That the idea is feasible—of that we have no doubt. Whether, if adopted, it will succeed, no man knows. That it would in aftertime often be subjected to strain is certain, but that as against a regime of military force it is to be preferred, we believe also is certain.

In various letters written by Dean Wigmore just before his catastrophic death, he referred to this article describing it as an article lying "in his inkwell."[1] The fragment now published probably was his last writing. Whether, so far as it goes, it was a final draft, can not be known. The present article is a revision of an earlier draft of seven ms. pages dated March 21, 1941. It is evident that the subject was one which he had long considered. He had probably read scores of recent books bearing on his problem. That he himself regarded the idea of boycott combined with an insurance system, as feasible, and preferable to the employment of military force, we believe, is an important fact, and it is a fortunate circumstance that his proposal, even though in imperfect form, is now available for the consideration of those who will bear the burden of once more attempting to prevent for the future the recurrence of the most persistent and devastating evil that through the centuries has afflicted the human race.]

— *A. K.*

---

*Edited and completed by Albert Kocourek, Professor Emeritus, Northwestern University School of Law.

1. On March 24, 1943, Dean Wigmore wrote the following letter:

"Commander Harley Cope, U.S.N.,
% U. S. Naval Institute,
Annapolis, Maryland.

Dear Sir:

I take the liberty of offering you my compliments on your brief and pointed article, entitled 'When Peace Comes' in the February number of the Institute Proceedings, and especially upon your proposal on page 168 to resort to the economic boycott as the means of enforcing decisions of a world council. For a long time past, I have been looking for some one to advance such a proposal as a far more effective expedient than the international police force. The latter will no doubt have to be organized for potential use; but the former will be the really effective thing. I hope that you will keep harping on that subject. There are of course serious practical difficulties, but I believe that they can be overcome. I will not burden you at the present writing with my solution, but I have in my inkwell an article entitled 'Bullets or Boycotts, as a Means of Enforcing a New International Order.' I aim to reach our legal profession inasmuch as their support would be almost essential for any such measure."

BULLETS OR BOYCOTTS

ALL the proposals for a post-war world order, no matter how widely variant in the type of association favored, agree upon at least one common feature, viz., that there must be some measure for preventing a breach of international peace. And the favorite proposed measure is an international police force.[2]

But there are two kinds of Force—physical and economic. Each has its uses, and each has its successes. In the traditions of family discipline, physical force is represented by a whipping or a spanking—economic force by sending the boy to bed without his supper. So also with recalcitrant governments. Shall the force be bullets or boycotts, or both?

The present purpose is to point out the possibilities of the economic boycott as the preferable method. And the ensuing observations are offered primarily to the attention of lawyers, because, while a police force will require the expert service of the armed forces, the economic boycott will require at every stage the expert service of the legal profession, in cooperation with the economists.

The proposed plan will be outlined, as briefly as possible, under these heads: I, The International Boycott as Preferable and Feasible; II, The Obstacle; III, The Remedy to Remove the Obstacle; IV, The Application of the Remedy.

I. The International Boycott as Preferable and Feasible

Preferability. It is markedly preferable to armed international police violence (equivalent to a short war) for four reasons:

(1) By avoiding mutual slaughter, it would avoid the cruel ruin of family relations and the disruption of social life;

(2) It would avoid the miserable aftermath of national feuds, permanent hatreds, and historic enmities;

(3) It would be cheaper in money cost, and the offending nation would alone bear the principal cost (in the way to be pointed out);

(4) The disturbance to international economic relations would much sooner subside.

Are not these considerations decisive, if the measure is feasible?

Feasibility. The means employed would be the severing of all economic relations, isolating the offending nation and paralyzing its international and national life, until its government yields. The measures for such severance would be:

(1) All bank credits and foreign exchange to be suspended;

(2) All imports to that nation, and all exports to cease, and shipments in transit to be diverted to other ports;

(3) All property rights of that nation, and of its citizens, in other countries to be impounded;

(4) All international communications with that nation to be controlled and censored in the other countries, and

(5) Other detailed measures too lengthy to describe here.

The experience of the United Nations in World War II in organizing the control of international trade has sufficiently proved that a united exercise of the above measures could not fail to bring to terms the recalcitrant government.

Theoretically, the measure is feasible. But *politically* it encounters immediately an obstacle which would be fatal if not overcome. To that we now turn.

II. The Obstacle

That near-fatal obstacle would be the *opposition of the tradal and industrial groups,* in all the other countries, *to suffer the sacrifices that they themselves must make as a part of the boycott.* For, of course, the boycott would operate in both directions in its severance of trade relations. The stoppage of *exports* from the culpable nation would mean the cessation of those goods as importations to the other trading countries; and the stoppage of imports to the culpable nation would mean the stoppage of exports of those goods as exports from the other countries. The pressure of opposition from those combined groups upon the boycotting governments would be enormous. Nor would it be confined to the importers and the exporters directly concerned; it would include the manufacturers and the wholesalers of the exports, and the wholesalers, the retailers, and the consumers of the expected imports, all along the line.[3] For commerce is always self-interested and generally selfish. Those groups would insist—and fairly enough—that they alone should not be made to bear the sole burden of the sacrifices necessary to effect the boycott. The cause being a national one, the burden should be a national one.

Human nature being what it is, must we not concede that a realistic view of what would be involved in such a boycott makes it certain that the outcry of opposition from all the interested groups would prevent governments from committing themselves to the plan of an international boycott? It will here be assumed that this obstacle would be fatal, unless it can be overcome by some effective expedient.

But is it, indeed, insuperable?

---

2. Under-Secretary of State Welles, Address May 30, 1942 (Dept. State Bull. VI, 485): "The people of the United States . . . will insist that the United Nations undertake the maintenance of an international police power, in the years after the war, to insure freedom from fear to peace-loving peoples," etc.

Messrs. Hoover and Gibson, *The Problem of a Lasting Peace,* 1943, pp. 263, 279, "During the interregnum . . . the victorious powers must maintain order in the world by military force."

3. [There is nothing in the ms. to indicate the content of this note. The space left (one line) is only sufficient for a single book reference. Accompanying the ms. is a Chicago Tribune clipping quoting an Associated Press item dated July 26, 1941, under the head: "Blow at Japan Hits 25 Million Chicago Trade." The ensuing article discussing "President Roosevelt's order freezing Japanese assets in the United States," establishes the point made in the above text.—A.K.]

III. The Remedy To Overcome the Obstacle

The situation is one of mass damage to large groups of people. And there is a remedy which has long been employed to meet such situations, viz., insurance. The vast world-wide damage of maritime loss has long been thus covered; today all maritime damage law ends up in an insurance office. So, too, with personal accident damage—with fire losses—with employee defalcation losses—and, latterly, with bank deposit losses.

[The above discussion of "The Remedy" is the end of the ms. That Dean Wigmore intended to enlarge the argument seems probable since the material available for consideration is very extensive. Nevertheless, the point is clearly made.

At this point an important question is presented—How is the insurance idea to be organized and implemented?

Dean Wigmore's exposition presupposes a juridical organization of at least all the important states. That organization may be one of an unlimited variety of forms ranging from a *civitas maxima* (highly improbable within any foreseeable millennium) to a form of league or confederacy limited to problems of international administration (e.g., the International Postal Union). It also presupposes a continuation of the Permanent Court of International Justice and of the Permanent Court of Arbitration.

In the next subdivision (IV), Dean Wigmore proposes that member nations pay, to an economic council, assessments made against them to pay the claims resulting from enforcement of a boycott if and when declared. The implication seems to be that these assessments are to be made and paid *after* declaration of a boycott against a refractory state. If this (improbably) is the true meaning of Dean Wigmore's proposal, we are constrained to believe that it devitalizes the general plan and will result in the end in the downfall of the whole structure. There is an alternative solution entirely consistent with the general proposal. The alternative is that each member nation pay in to an economic council *each year* an assessed amount computed, as Dean Wigmore suggests, on its total external trade.

Some reflections bearing on this alternative are:

(a) It is consistent with Dean Wigmore's general plan.

(b) The amount of the assessment should take into consideration the military and naval outlays of the various countries. As time goes on, the need of armaments for defensive purposes will gradually diminish. As armaments diminish the amount of the assessments can be increased if it be thought desirable.

(c) Since the ending of the present war will quickly result in a diminution of war outlays, as large an assessment as can practically be supported should be made against member nations *at the earliest possible moment.*

(d) If a war of global proportions can be avoided for a period of say twenty or thirty years, assuming that all the great nations are members of the league, and regularly pay in their assessments, and further assuming that armaments are progressively reduced in *all* countries, it would seem that a long era of world peace would be a virtual certainty.

(e) As the assessments from the various member states mount up to very substantial proportions, the stake of each member in the fund will be an effective aid in maintaining, if necessary, a boycott.

(f) It is, of course, assumed that the boycott fund will never greatly exceed the amount necessary to maintain a sound reserve for the payment of claims.

(g) Since the perils of war affect chiefly those engaged in international commerce and since what is above proposed is designed for their special protection, it seems desirable that the treaty which establishes the indemnity principle, require each signatory member to collect an *ad valorem* tax on each international bill of lading sufficient in the aggregate to cover its assessment. The details may here be passed over.

IV. The Application of the Remedy

On this subdivision, Dean Wigmore left a pencil memorandum which is entirely adequate to explain his ideas He divides the process into five stages, as follows:

"(1) Individuals damaged in each country present [their] claims to their governments within [a] limited time.

"(2) [The various] governments present [these and other (?)] claims to the International Claims Commission, for decision within [a] limited time, under rules for figuring trade damage.

"(3) [The] Claims Commission presents [the] total [claims] to [the] International Economic Council, and [the] Council—

"(A) calculates [the] total assessable upon [the] wrongdoer (= (a) total amount of claims awarded, plus (b) overhead expense incurred at (headquarters?) in effecting the boycott.)

"(B) assesses the member nations [their] ratable share on [a] 4000 unit system.[4]

"(4) Member nations pay in assessed amounts to [the] Economic Council, which directs [the] International Bank to pay out awards to individual claimants.

"(5) [The] Economic Council directs [the] culpable nation to issue bonds or pay cash for [the] total damage assessed."] A. K.

4. [Dean Wigmore left a memorandum extracting from the World Almanac (1943) data for the year 1940 on world trade. Dean Wigmore computes the total trade (including both imports and exports) of all countries at $17,997,000,000 or as Dean Wigmore puts it "say 20,000 millions roughly." Haiti rates at $8 million, about ten countries rate under $20 million each, and two countries reach the $2,000 million bracket. Dean Wigmore divides the total world trade (roughly $20 billion) into units of $5 million thus making 4000 units. Some of the concrete samples of the result are: United States, 764.6 units; Sweden, 93.8 units; India, 128.8 units; Great Britain, 708.6 units; Haiti, 1.6 units—A.K.]

IMPROVING THE ADMINISTRATION OF JUSTICE

BY ROSCOE POUND

Dean Emeritus, Harvard Law School

ULPIAN tells us that as lawyers we cultivate justice and profess knowledge of what is just and equitable. Hence to the lawyer improvement of the administration of justice is a perennial task. There always has been, there always will be, need of improving it, as in the case of every other activity or process. But there is more than ordinary need with us today. Law is under attack all over the world. It is, indeed, involved in any civilization, and for ours, which is preeminently a legal polity, is fundamental. Like any foundation it is always under strain, and the strain is more severe in eras of transition. Today ideas of justice and of the end of law are in transition and this puts increased strain upon law and upon the courts. Our economic order is in transition from the rural agricultural society of our formative era to the urban industrial society of today. This puts a strain both on the substantive law and on procedure. But the substantive law depends on procedure to make it effective. Much of what seems discontent with our substantive law is at bottom due to failure of procedure to make the law effective in action.

Causes of Dissatisfaction with Courts and Law

At the outset it must be admitted that there are a number of inherent causes of dissatisfaction with administration of justice according to law the effects of which we may minimize but which we cannot expect to eliminate. There are limitations on achievement of the end of the legal order by means of a body of authoritative grounds of or guides to determination, developed and applied by an authoritative technique. Equally also there are limitations upon law in the sense of the judicial and the administrative processes. Even the legal order itself, the regime of adjustment of relations and ordering of conduct by the systematic and orderly application of the force of a politically organized society, must depend to no small degree upon the functioning of other agencies of social control, such as household training and discipline, religious training and the discipline of organized religion, and the canons of ethics and internal discipline of groups, associations, trades and professions. Although these agencies now operate almost entirely subject to the paramount control of politically organized society, in the past the law only reinforced them, where now we think of them as reinforcing the law. This change in what might be called the center of gravity of social control puts an increasing strain upon law.

Inherent Causes

It is worth a brief digression to note the inherent causes of dissatisfaction with judicial justice according to law which we must not ignore. One, which on the whole is the most active and constant cause, is the necessarily mechanical operation of rules and to a less degree of principles and conceptions. This is a price which must be paid for certainty, predictability, and uniformity. Because of this, almost every Utopia which has ever been sketched has been planned to operate without law and lawyers. But the economic order demands certainty and predictability, and human objection to being subjected to the arbitrary will of another demands uniformity.

A second cause is inherent in a system of formulated legal precepts. They tend in large part to formulate the moral ideas of the community. So far as they are formulations of the morality or ethical custom or public opinion of the time and place, they cannot take form until morality and ethical custom and public opinion upon some new point or new situation has become fixed and settled. Nor can they change until a change in morality and ethical custom and public opinion is complete and manifest. Thus there is an inevitable difference in rate of progress between law and morals. The law does not change until ill effects are felt. Often it does not change until they are felt acutely. Moreover, in order to secure certain social interests, the law operates to restrain individual free self-assertion. But men are impatient of restraint and so are forever pushing to the furthest logical limits of legal formulas. Thus those formulas are subjected to a strain which formulations of experience in other practical activities do not encounter.

In the third place, if we have a system of authoritative precepts and an authoritative technique of developing and applying them, we must, in a complex social and economic order, have judges trained in the system of precepts and in the authoritative technique. But judicial justice has shown a tendency to become overlogical in carrying out principles to their extreme limits or in referring cases to legal conceptions in such wise as to sacrifice more than is secured. We must pay a price for the advantages of judicial justice, as we must for the advantages of law. Law is a taught tradition

Address delivered before Maryland State Bar Association June 26, 1943.

and yields slowly to political or economic changes. In the hands of teachers and professional commentators it is not unlikely to become overabstract and overrefined and so to get out of touch with the life which it is to regulate.

These difficulties are inherent and are largely beyond the reach of programs of law reform. But we should not for that reason cease our attempts to minimize their effects so far as we may.

Historical Causes

There is another type of causes of dissatisfaction with the administration of justice. Causes of this type are not inherent in the legal order nor in maintaining that order by means of authoritative precepts applied by an authoritative technique, nor in the judicial process. Chiefly they are historical in origin. Mostly they have grown out of survival of institutions and methods devised for administering justice in former times and under conditions which no longer obtain. Long-continued experience is needed in order to find out how to adjust relations and order conduct with the least friction and waste. After experience has shown how best to treat certain persistent problems and what institutions and organization of the agencies of justice and what procedures are best suited to a time and place, it sometimes happens that social and economic changes have gone on more rapidly than was compatible with adjustment of the machinery of justice to meet them. When, as in this country, in the latter part of the nineteenth century and in the present century, a body of institutions and methods has reached maturity while the type of society in which it arose has been giving way to one of another type, the resulting patchwork tinkering to meet new conditions but partially understood can only produce general popular dissatisfaction with the administration of justice such as was so marked a generation ago. Great progress has been made in the past forty years in eliminating these sources of dissatisfaction. It has been achieved for the most part through the activities of bar associations. Yet much remains to be done, and the evils resulting from those causes now eliminated often lives after them.

In the last quarter of the nineteenth century, accumulation of these historical survivals and their developments had become such that there was a general attack upon our administration of justice in the beginning of the present century. There was agitation for legislative review of decisions, for popular review, for recall of judges, and for recall of decisions. Criminal appellate commissions were urged, and even criminal commissions to replace criminal courts. The rise of administrative adjudication and opposition to even the minimum of judicial review required to insure adherence to law and due process of law are in large part a result of these movements and the conditions that led to them. Let us recall what has been taken away from the courts within a generation. In many jurisdictions commercial arbitration, given impetus by just dissatisfaction with the way in which commercial causes were handled in court a generation ago, has taken a great part of contract litigation away from the courts. Due chiefly to the unsatisfactory state of the substantive law on the subject, as it developed in the last century, but also to the delay and expense involved in the endeavor to determine responsibility and make an exact ascertainment of damages, industrial accidents have been taken away from the law of torts. There has been a growing movement to remove injuries in the course of transportation by public utilties and in automobile accidents from the competence of the courts and entrust those subjects to an administrative agency. Unfair competition has largely been taken over by an administrative commission. Another commission has taken over the issuance, promotion and marketing of securities and the liabilities involved. Administration has relieved our courts of equity of much of what was committed to them formerly in corporate reorganization. Both contract and tort in case of labor disputes are disappearing from the law. As a recent writer has put it, public law, applied by administrative agencies, is swallowing up law administered by the courts. The last twenty-five years have been as eager to take controversies away from the courts as the last century was to insure that all things were done in accordance with law by committing them to the courts.

Recent Improvements in Maryland

Maryland was once a pioneer in improving the administration of justice. In 1785 a statute providing that a decree requiring conveyance should, if not performed, be taken in all courts of law and equity to have the same operation and effect as if the conveyance had been executed conformably to the decree, substituted a simple and commonsense mode of enforcement for the clumsy device of constructive trust. A relatively modern appellate procedure was substantially fully developed in eighteenth-century Maryland. Also Maryland adhered to the common-law doctrine of election between exceptions and a motion for a new trial and so developed the practice as to be spared what came about in many jurisdictions where the motion for a new trial was made a necessary preliminary to error or appeal in the nature of error and bred a swarm of technicalities.

You have not been among the foremost in the work of improvement nor shown the same creative energy in the present century. Yet much has been achieved recently. You have taken a needed forward step in submitting a constitutional amendment making the judges of the Court of Appeals primarily and for all ordinary purposes appellate judges only, limiting their duties to appellate work, except that they may occasionally sit at trials when necessary, and trial judges may sit in the Court of Appeals temporarily in order to provide for

temporary vacancies therein. Both of these exceptions to the complete separation of appellate from trial work are important and commendable. It is highly desirable that it be possible in cases of exceptional difficulty and importance to assign to a trial the best judicial talent and experience in the state. The Lindbergh case is a good example of the advantage of a judicial organization which permits this. The other provision is needed to insure an adequate bench in the appellate court in case of illness, disqualification or other temporary vacancy, and to prevent waste of judicial power. It has worked well where tried in other jurisdictions.

You are taking another good step forward in the proposed amendment which will allow the legislature to provide for assignment of any of the judges of the state to sit anywhere in the state, outside of their own circuits, in case of accumulation of work or indisposition or disqualification of local judges. This, too, is a step toward eliminating waste of judicial power. The typical American circuit system was devised for the conditions of a rural population, with respect to which it is possible to frame districts or circuits approximately equal in probable volume of litigation, or of travel before the days of good roads and automobiles, when courts had to be set up within the convenient reach of litigants in farm wagons or on horseback. In the earliest and worst form of this circuit organization, the judges of the courts could only sit in the local court for which they were elected. In time, different states began to make cautious provisions for exchange or for one judge calling in another to take his place or for choosing or designating a special judge where the regular judge was disqualified or unable to sit. Later different states began to make different provisions for calling in a judge from another circuit or district or county to aid in disposing of arrears. But the machinery for doing this was far from simple. It was no one's business to set it in motion, and often arrears had to pile up to the point of a scandal before anything was done. Even now it is rare, except in the federal judicial organization, that the whole force of this set of courts may be applied by intelligent and responsible administration when and where it is needed. In a few states the judges of the superior courts of first instance are, as they ought to be, judges for the whole state, and have a flexible organization which permits them to be used where the condition of judicial business dictates. In this respect the organization of the federal courts since 1911 has become a model. But there is still much to be done in the way of efficient organization of the courts of general jurisdiction of first instance everywhere. Especially they need an administrative head with power and responsibility for exercising it.

But you are proposing to take a real step forward. If I were to criticize your proposal, it would be for committing the matter to legislation rather than to rules of court. But perhaps the legislature, at least in time, may leave the details to rules of the Court of Appeals, where it belongs.

Another improvement which you are making is in providing for a clerk of the Court of Appeals appointed by the court instead of elected. Emancipating the clerical work of the courts from politics and putting it where it ought to be, namely, under the control of the courts themselves, must be an important item in any program of improving the administration of justice. The sort of thing which has been too common where the clerks of the courts have been independently elected by popular vote, or otherwise so chosen as not to be answerable to the courts, was shown some years ago when the highest court of one state, since its docket was in arrear, called a special sitting in July. The clerk, who was an elected official by virtue of the constitution, elected for six years, as the judges were elected for nine, refused to attend this sitting. As he put it, he was not accountable to the court. He was accountable only to the people. He had arranged to go away for the summer. If the court decided to sit in vacation that was its affair; but it would do so without a clerk. Such things are wholly out of place in the conduct of any sort of administration today.

Of much more importance is the forward step you are taking in the proposed amendment making the chief judge of the Court of Appeals administrative head of the judicial system with power to assign trial judges to sit in the Court of Appeals in place of absent judges, to assign judges of the Court of Appeals to temporary work at nisi prius, and to assign circuit judges to temporary work in other circuits. But more is needed. There ought to be responsible control of the whole administrative work of the courts. The organization of the federal courts with the administrative office is admirable in this respect. Connecticut also has a good system whereby the judges of the highest court may appoint an executive secretary to the judicial department of the state government. What we have been doing piecemeal for parts of the judicial system we should be doing thoroughly for the whole.

You in Maryland have been spared the intermediate appellate court and double appeal. You have a good practice of certiorari where judgment is rendered in the circuit court on appeal from a justice of the peace. Best of all, you have taken the step which is the beginning of wisdom in improvement of procedure in committing it for the future to rules of court. You were spared what was the root of much evil in many jurisdictions, detailed codes of procedure. In the heyday of the New York Code of Civil Procedure, when it had grown to over thirty-four hundred sections, Mr. Hornblower said of it that it aimed to regulate every act of the judge from the time he entered the courthouse except that it did not prescribe the exact peg on which he should hang his hat. The evil that this minute legislative

prescribing of detail did lives after it in many states. But if you were spared the code, you had your share of legislative fixing of details of procedure. As I went through your statute book and the last edition of Poe's *Pleading and Practice* I made a good many notes, with which I will not trouble you, illustrating how some of the commonsense simple procedures of your colonial era got encumbered or distorted by legislative detail. Some of these details of procedure have been pruned away by recent statutes. I venture to think there is still much upon which your Court of Appeals may well be exercising its rule-making power.

Points in a Program of Improvement

I have been at some pains to recognize what you have done toward improvement. Recognizing this, let me point out something of the task which is still before you.

Taking the country as a whole, there are no less than five points demanding attention in an effective program of improvement. They are (1) the organization of courts—unification of the judicial system; (2) the personnel, mode of choice and tenure of judges; (3) the organization of the bar; (4) procedure, in small causes, in the courts of general jurisdiction at law and in equity, and on appeal, the latter being especially important in view of the multiplication and wide powers of administrative tribunals and the problems of judicial review of their proceedings; and (5), last but very far from least, criminal law and procedure. One could write a book on each of these heads. I shall essay no more than to indicate the general problems and the main principles of attack upon them, and give a few illustrations under each except the last—criminal law—which is too big a subject for less than an address by itself.

Organization of Courts

It is not possible to frame any standard organization of courts to fit all the states. It would be as futile as the attempt to treat all localities as equal for an organization of local courts which was made so generally in our formative era. States differ so widely in area, in geographical conditions, in conditions of transportation, that even if history and tradition did not have to be taken into account, some or even a great deal of diversity of organization must be expected. But there are certain general principles which should govern. The controlling ideas should be unification, flexibility, conservation of judicial power, and responsibility. Unification is called for in order to concentrate the machinery of justice upon its tasks; flexibility in order to enable it to meet speedily and efficiently the continually varying demands upon it; responsibility in order that some one may always be held and may clearly stand out if the judicial organization is not functioning the most efficiently that the law and the nature of its tasks permit. Conservation of judicial power is a *sine qua non* of efficiency under the circumstances of the time. There are so many demands pressing upon the government for the expenditure of public money that so costly a mechanism as the system of courts cannot justify needless and expensive duplications and archaic business methods. Moreover, waste of judicial power impairs the ability of courts to give to individual cases the thoroughgoing consideration which every case ought to have at their hands. Administrative organization of the entire system with responsible heads of each branch and department and division, and responsible superintending control of the whole, is quite as important as reform of procedure upon which the profession and the public have concentrated their attention for a generation. Indeed, the importance of organization of courts is something we are only beginning to perceive. Instead of setting up a new court for every specialized task, we should provide an organization flexible enough to take care of new tasks as they arise and turn its resources to new tasks when those to which they were assigned cease to require them. The principle must be not specialized courts but specialist judges dealing with their special subjects when the work of the courts is such as to permit, but available for other work when the exigencies of the work of the courts require it. Looking at the country as a whole, for at least two generations we have not fully utilized the judges of our courts, although we have often made them or many of them work very hard. We need to be sure that we are making the best as well as the fullest use of them.

Experience has shown even with the best of plans it is wise not to go into much detail in authorizing or requiring certain courts. This is true especially of constitutional provisions. Recent constitutional amendments in some states have too much detail even for statutes. Continual legislative amendment of the statutes governing the organization and administration of the courts was a serious hindrance to the administration of justice in many states in the last century. A constitution is not the place for details which, if they work badly, can only be removed or improved by the slow and sometimes painful process of constitutional amendment. Authority to set up a modern organization and responsibility for doing it and doing it effectively are the main points to be attended to.

Organization of Administrative Work of Courts

It is but little less important to organize thoroughly the incidental nonjudicial business of the courts. Legislation should not lay down details for this side of the administration of justice. Competent business direction should be provided and the clerical and stenographic force be put under the control and supervision of a responsible director. But legislation should do no more than settle the general principles and leave the details to rules of court to be drawn up, altered, and improved, with the aid of the judicial council, as experience shows defects and abuses and indicates the best way of dealing with them.

Until one sees what has been done in some jurisdictions by organizing the clerical work of the courts, one cannot realize that the system or want of system which prevails generally in the states is a prolific source of needless expense in the courts. Decentralization of courts was carried so far in the last century that the clerks were often made independent functionaries, not merely beyond judicial control, but independent of any administrative supervision and guided only by legislative provisions and limitations. No one was charged with supervision of this part of the work of the courts. It was no one's business to look at it as a whole, seek to find how to make it more effective, and to obviate waste and expense and promote improvement. In consequence, much unnecessary duplication, copying and recopying, and general prolixity of records developed in the great majority of our courts. Much has been done in recent years, especially in appellate procedure in the federal courts, to reduce this cost. But there has been no more than a beginning. The judiciary is the only great agency of government which is habitually given no control of its clerical force. Even the pettiest administrative agency has much more control than the average state court. But scientific management is needed in a modern court no less than in a modern factory. Dissatisfaction because of the cost of litigation has not been the least factor in turning controversies away from the courts and resort to arbitration and administrative justice.

With no one responsible, there is no incentive to progress. Much that could be done to reduce costs in litigation and the expense of operating the courts remains undone because it is no one's business to find what can be done and how to do it and to see it done. Organization, control, simplification, and general improvement are demanded here no less than in the judicial business of the courts.

It is becoming especially important to reduce the cost of the courts so far as it can be done consistently with making and keeping them as efficient as we can. Today there are many new claims pressing upon government which made no demand in the days when preserving order and administering justice were held the main if not the sole tasks of politically organized society. Many competing ends of government now make increasing drains upon public revenue. The established institutions of the past can maintain their claims in the face of this competition only if they use to the best advantage the money appropriated to them. They cannot so use it as they are organized today. Organization of the nonjudicial, administrative business of the courts calls for complete and efficient supervision, under rules of court, which is best to be obtained by unification of the judiciary as a whole, with responsible headship, charged with supervision of the subordinate supervising and superintending officials. Our courts should not be less well organized than their rivals, the administrative agencies.

Personnel of the Bench

Personnel, mode of choice and tenure of judges is a subject as to which local conditions vary. I shall not do more than advert to it as an item of the first importance. To maintain the independence of the judiciary and keep it out of politics does not need to be preached to a bar association.

Organization of the Bar

Nor shall I do much more than advert to organization of the bar, although that is a no less important item in a program of improvement. I note that in Maryland disciplinary proceedings may be instituted by the judges, by bar associations, or by five attorneys. Thus there is a diffused responsibility and an invidious task is likely to be undertaken only in exceptional and scandalous cases. In England, incorporation of the lower branch of the profession, the members of which had been borne on the rolls of the courts and subject to judicial discipline, did away with Caleb Quirk of Alibi House, and Dodson and Fogg, and Sampson Brass and Mr. Vholes. With us, there has been a like task, calling for responsible organization. The organized bar has more than justified itself in more than half of the states.

Procedure

Most of the advance which has been made in the present century has been in procedure which along with organization of courts was the weakest spot in our administration of justice as it was in the last quarter of the nineteeenth century. I can only speak of some fundamental principles of improvement and some anachronisms which you have still to cut off. The starting point of improvement of procedure, the first canon of reform, must be that legal procedure is a means, not an end; it must be made subsidiary to the substantive law as a means of making that law effective in action. Hence that procedure is best which most completely realizes the substantive law in the actual administration of justice. A second canon should be that there should be no such thing as an individual procedural right, that is, a recognized claim to a procedural advantage merely as such. It should be for the court in its discretion, not for the parties, to vindicate rules of procedure intended solely to provide for the orderly dispatch of business, the saving of public time, and the maintenance of the dignity of tribunals. Such rules should be differentiated sharply from those designed to secure to all parties to litigation a full and fair opportunity to present their cases and their claims arising out of them to the tribunal, and a full and fair opportunity to meet the case brought against them and the several claims arising out of that case. It is this type of rule that is to be invoked by litigants as a matter of right. A third canon should be: The ideal of mechanical disposition of one narrow issue or of one simple application for a specific remedy

should be replaced by an ideal of complete disposition of entire controversies in one proceeding, in which all the remedies of the legal system are available, in order to give full effect to the substantive rights of the parties.

When law was a system of remedies, not a system of substantive precepts defining and securing substantive rights, the function of a tribunal was simple. It existed only to try whether or not the complainant was entitled, at the hands of that tribunal, to the specific remedy that he formally sought. The spirit of that time has been with us ever since and has maintained and produced many gross anachronisms. The equitable principle of complete disposition of the entire controversy between the parties should be carried out to its full content and should be extended to every sort of proceeding. Piecemeal disposition of controversies is a result of logical development of ideas appropriate to the mechanical modes of trial in the beginnings of law and to law as simply a system of remedies.

These ideas have received their fullest recognition and development in the Federal Rules of 1938. Local conditions vary so greatly that it is not to be expected that each state at once adopt those rules as a whole or even with some little adaptation. But the model is at hand and courts which possess a full rule-making power can see what is before them to be done, how it may be done, and what results have followed each new rule in the experience of the federal courts.

I submit that Maryland needs, in addition to what has been done as to procedure, further simplification of pleadings and throwing the burden of formulating issues and giving notice of claims of fact upon discovery; the pre-trial conference, and the summary judgment. These improvements eliminate surprise and waste of time and energy in proving things not really in controversy, and shorten trials and records on appeal by getting cases down to the points actually in dispute. Your Court of Appeals has acted with extreme caution in the exercise of its rule-making power. The good example of the Supreme Court of the United States, the Supreme Court of Illinois, the Supreme Court of Michigan, and the Supreme Court of Texas ought to encourage the judges to follow the lines of improvement now well laid out, and do what is needed for the administration of justice under the conditions of today. Otherwise the legislative steam roller may be invoked again, as it was in the middle of the last century in default of exercise of rule-making power to simplify the procedure inherited from England. Legal procedure has suffered for a hundred years from the legislative prescribing of detail, followed by legislative tinkering in particular spots, which the judicial and professional inertia of the second half of that century brought about.

Appellate Procedure

In particular, you have still one anachronism which is being generally eliminated in new rules of court and recent practice acts, namely, exceptions. In a case in 180 Maryland, a party who had made proper objections at the trial, which had been ruled on adversely, as he could not get a record showing exceptions, so as to have the rulings reviewed, tried vainly to sue in equity to get a new trial. But in the same volume we read that where it is the practice of a trial court to allow as of course exceptions to all adverse rulings on prayers, whether actually noted or not, the exceptions formally presented by the record are properly before the appellate court. Thus exceptions have become a mere unnecessary form. The Federal Rules have wisely done away with them, as the English practice did long ago.

Another anachronism is the survival in appellate procedure of the idea of review as an independent proceeding—originally a trial of the judge or court below for a wrong decision. Let me simply discuss one example of this anachronism in action. In 180 Maryland we are told that on appeal the Court of Appeals "can only review the record before the circuit court. Aside from being improper [to notice an instrument not in evidence below but brought into the record above by agreement] it would be unfair to the court below."[1] Such undoubtedly is the law except where changed by statute or rule of court. Note how the rule works. In *Stephens County* v. *McCammon, Inc.*[2] there was an action in the state court by a foreign corporation. Issues having been joined on the merits, defendant asked to withdraw its pleadings and urge a plea in abatement that plaintiff had failed to pay its franchise tax and so was without authority to maintain a suit in the courts of the state. The motion was denied. After judgment for plaintiff, the sole error on which the intermediate appellate court reversed the judgment was denial of the motion. Plaintiff offered to show in the appellate court a certificate of the Secretary of State that the tax had been paid. It was held in the Supreme Court that "when an appellate court is called upon to revise the ruling of the trial court, it must do so upon the record before that court when the ruling was made. A party to a suit will not be permitted to try his case in the appellate court on a different statement of facts than that presented in the court below." But at the trial below the question as to payment of the franchise tax was not in the record to be tried. When the intermediate appellate court held it should have been, the conclusive certificate of the Secretary of State showed that the plea would not be available at a new trial. In this particular case, on the merits the judgment below was clearly right. But it was to be reversed to try a plea in abatement which could not be maintained as a conclusive certificate showed. Such things explain the vogue of administrative tribunals and administrative adjudications.

---

1. *Trust Company* v. *Harrison's Nurseries, Inc.*, 180 Md. 651, 657 (1941).

2. 122 Tex. 148 (1932).

In *Fain* v. *Commonwealth*[3] there was an indictment for uttering a forged cheque. It was established beyond doubt that the cheque was forged and was uttered knowing it to be forged. The rulings on evidence were found to be correct and the instructions not prejudicially erroneous. But the indictment set forth, and it was part of the offense to prove, that the bank on which the cheque was drawn was authorized by law to do a banking business. This the prosecution forgot to prove Hence it was necessary to reverse the conviction and order a new trial. The court could take judicial notice of the statute as to incorporation of banks. That statute provided for recording of a copy of the articles of incorporation in the office of the county clerk of the county in which the bank was located, and in the office of the Secretary of State. Thus a certified copy which could have been obtained in the very building in which the court was sitting would have incontrovertibly established the missing proof. To require a new trial under such circumstances is to make a joke of criminal procedure.

In *Bloodworth* v. *McCook*[4] there was a proceeding to probate a will. There was a caveat on the grounds of want of testamentary capacity and undue influence. The jury found for the will. There was found to be no error at the trial to require reversal. In reality there was no controversy as to execution of the will. But it was signed by mark with a witness to the mark followed by an attestation clause with three attesting witnesses. The proponents, under the belief that no more was required, called the three only. However, as the statute said "three or more competent witnesses," it was held that the witness to the mark must be regarded as one of the statutory attesting witnesses and was required to be called or accounted for. Accordingly, a new trial was ordered although there was not the least doubt what the witness's testimony would be. An affidavit or a deposition before one of the judges or the clerk of the court or a master would have saved the delay and expense of a new trial.

Power to produce the incontrovertible evidence in the appellate court in the Kentucky case would probably have resulted in the point's not being raised at all. But in any case very little of the time of the court would have been taken up with the new evidence which was not really in controversy. The waste of time involved in not allowing it to be produced is out of all proportion to the time involved in receiving it.

What is most interesting about these cases is the idea that to admit the evidence in the upper court is "unfair" to the judge of first instance. Certainly the function of legal procedure is to reach sound results on the merits of particular cases, not to enable a judge of first instance to show a perfect score of unreversed judgments and decrees. It is no disparagement of him that on further evidence an upper court might have to modify one of his orders.

England, California, Kansas, New Jersey have done away with this remnant of an obsolete conception of review.

I submit the following as a canon of improvement of appellate procedure: The ideal of appellate procedure should be not a separate proceeding in a distinct tribunal but an application for rehearing, new trial, vacation or modification, as the case may require, made in the same cause before another branch of the same tribunal.

Small Causes

Small causes and small cause courts have been a problem from the beginning of our judicial history. The English organization of courts in the seventeenth and eighteenth centuries did not furnish a good model. In the seventeenth century a number of experiments (e.g., in Massachusetts, commissioners for small causes) were tried which, however, came to nothing. Special courts for small causes were set up in many of the colonies in the eighteenth century. But there was an increasing tendency to confer jurisdiction of such cases upon a single justice of the peace. Unhappily, there was no great confidence either in these petty courts or in the single justice of the peace. Consequently, appeals to the court of general jurisdiction of first instance for a new trial as a matter of right were provided for. As the judgment of the latter court was reviewable by error or appeal, an expensive system of double appeals was fastened upon small causes which they could ill bear. It is only in the present century that through a device of an appellate division of a municipal court, or appellate term of judges of petty courts we have been able to some extent to remedy this bad situation. In the formative era after independence, constitutions generally provided for inferior courts to be established by legislation, but frequently provided for a petty civil jurisdiction of single justices of the peace. Where the constitution did not guarantee appeal to some higher court, legislation usually allowed it.

Throughout the nineteenth century, courts for small causes continued to present problems for which no satisfactory solutions were found. Almost every conceivable type of local or municipal tribunal and a great variety of types of jurisdictional grant or limitations as to justices of the peace were tried, and no satisfactory system emerged. The magistrate, taking a certain amount of time from his everyday work to dispense occasional justice among his neighbors, and paid for so doing by fees, was adapted only to sparsely settled and pioneer or rural communities and is an anachronism.

In 1847, England made a radical reform in the provision for small causes by setting up a system of county courts, manned by strong judges, often not inferior in ability to the judges of the High Court of Justice, with

3. 287 Ky. 507, 511 (1941).
4. 193 Ga. 53 (1941).

a flexible organization enabling the judges to be sent where business calls, and with a practice fixed by rules of court instead of by hard and fast legislative provisions. The county courts were a conspicuous success from the beginning and have had the entire confidence of the public. It was the original plan of those who drew the Judicature Act to include the county courts in the unified judicial organization. This was too radical for 1873 and this part of the plan was not adopted. But English experience has shown that it is entirely possible to administer a much higher grade of justice in small causes without resorting to the expensive methods of the courts of general jurisdiction of first instance, on the one hand, or reverting to a personal justice without law, on the other hand.

Better organized municipal courts have been set up generally for our large cities since the establishment of the Municipal Court of Chicago in 1906. Maryland has recently come into line in this respect with the setting up of the Peoples Court in Baltimore and provision for such courts elsewhere in the state if the local authorities see fit. Also the provision for trial justices, superseding the judicial functions of the justices of the peace, was an important forward step. But no state as yet has worked out a system for the whole commonwealth along the lines of the English county court system. Something of the sort needs urgently to be done, and the state which establishes such a system will set a model for the whole country. For it is in these courts that the administration of justice touches immediately the greatest number of people. It is here that the great mass of the population, whose experience of the law is not unlikely to have been experience only of arbitrary action of magistrates in traffic cases, might be made to feel that the law is a living force for securing their individual as well as their collective interests. The most real grievance of the people with respect to American law is not against the substantive law but instead against the enforcing machinery which may make the best of rules nugatory in action. There is danger that in discouraging small causes we encourage wrongdoing, and any legal aid society can testify that we have been doing that very thing. Until recently we have been callous to the just claims of this type of controversy, and there is still much to be done for them. What needs to be emphasized is that personnel is not less important than organization and mechanics of operation, and that the strongest judges who can be secured are none too good for the courts which have to do with small claims. Not only the English county courts, but a generation of development of municipal courts in this country have shown this abundantly. But the high type of judge which is required is more likely to be obtained for a dignified and high type of court. A unified system, such as obtains in England, is clearly indicated to that end.

The Substantive Law

On the civil side, our American substantive law is on the whole in satisfactory condition—exceptionally so, indeed, for a period of transition. But while the substantive law must be stable, it cannot stand still. Newly pressing interests and new forms of old interests continually require reexamination and new development of principles, readjustment of limitations upon recognized interests, and refashioning of established precepts. It is doubtful whether the courts unaided can carry the whole burden of developing the law as they were able to do in our formative era. Courts and organizations of lawyers and law teachers working together seem to be indicated as the pathfinders of our general law for the immediate future, as is suggested by the achievements of the American Law Institute, while the judicial council seems indicated for local problems, as demonstrated by the notable achievements of such councils in some of our most important jurisdictions. I cannot but think it a misfortune that you do not have an active judicial council in this state. I cannot take the time here to recount what those organizations have done and are doing for improvement of the administration of justice. Nor can I take the time here to urge a ministry of justice, for which, till we get it, the judicial council is the best substitute. Let us not forget, however, that some institution for continuous looking into the state of the law, how it functions in the state, what complaints it gives rise to, how far the complaints are well-grounded and what can be done about them, is the way to insure that our law shall not again fall into the condition to which legislative tinkering and statutory strait jackets had brought it a generation ago.

Importance of Improvement of Administration of Justice

Every one recognizes the notable work of the lawyers and judges of our formative era at the beginning of the last century in organizing an American judicial system and overhauling and developing the inherited substantive law and procedure to the conditions of the new world. In the twentieth century we have a like task. Independence required the reshaping of what had existed in colonial America to the circumstances of the rural agricultural country of that time. Today what was then given shape calls for a like refashioning to the needs of an urban industrial society. Certainly we have not lost the inventive fertility characteristic of Americans. There is call for us to apply it to the new task.

Maryland lawyers were among the leaders in the resistance to extra-legal administrative adjustment of relations and ordering of conduct under the colonial re-

(Continued on page 524)

AMERICAN BAR ASSOCIATION
JOVRNAL

General subscription price, $3 a year. Students in Law Schools, $1.50 a year. Price per copy, 25 cents.

EDITORIAL OFFICE

LOUISE CHILD ..... Assistant to the Editor-in-Chief
1140 N. Dearborn St. ..... Chicago, Ill.

Wigmore's Unfinished Inquiry

UNDER the title of "Bullets or Boycotts", we publish in this number the fragmentary notes left in Dean Wigmore's study. They were evidently made by him during his search for something that might be a more effective instrumentality than war for the restriction of aggressive and violent nations.

The proposal is by no means new. After the end of World War I, there was much discussion about economic sanctions but soon this discussion ended because the world seemed to lose interest in it. The substitution of something else for war again emerges and is attracting the attention of those who are seeking a lasting peace.

The notes are well reasoned, graphic and timely, although lamentably fragmentary. They must be read as preliminary drafts subject to reconsideration, and revision, surrounded by doubts which the author frankly sets forth, but to which he indicates some partial answers.

The JOURNAL is indebted to Albert Kocourek, Emeritus Professor of Law, Northwestern University Law School, for his valuable service in the preparation of the material and for his help in its interpretation.

We can only surmise the conclusions to which Dean Wigmore would have arrived at the end of his studies, and regret the loss of his participation in this supremely important issue.

For the Defense

ONE of the salutary reforms advocated by the Association is a system of public defenders in the federal courts. The desirability of this is not lessened by the decision of the Supreme Court in *Betts* v. *Brady*. That case left unaffected the rule enounced in *Johnson* v. *Zerbst* that under the Sixth Amendment counsel must be appointed to represent the accused in all criminal cases tried in the federal courts unless the right is intentionally and competently waived. Indeed, *Betts* v. *Brady* did not impinge upon the earlier rule of *Powell* v. *Alabama* that in a capital case in a state court the due process clause of the Fourteenth Amendment requires the appointment of counsel where the defendant is incapable of making his own defense.

Legislation setting up a system of public defenders in the federal courts and providing for the expenses of defending indigent accused has been introduced but is making little headway. The argument against such legislation is that the situation is adequately met by the appointment of counsel. It is true that members of the Bar uncomplainingly assume this burden when it is placed upon them, but this does not solve the whole problem.

Also, a case recently pending in one of the circuit courts of appeal, and noticed briefly in our Current Events column in this issue, points the fact that for another reason some legislation at least is urgently needed.

Dean Roscoe Pound's Notable Presentation

IN this issue Dean Roscoe Pound makes a notable contribution to the perennial tasks of improving further the administration of justice, in which his labors have been outstanding and prodigious. This time his texts are taken from the administration of justice in the State of Maryland; and his paper is his revision, with annotations, of a recent address before the Maryland State Bar Association.

The distinguished scholar speaks frankly and analytically of the administration of justice in Maryland, as exemplified in its state courts and its administrative agencies. He sketches the strides of progress which have been made, the structures and precedents which have worked particularly well according to the tests of practical operation, as well as those which still present problems and may not be regarded as yet fully abreast of the best experience had in other states, in achieving the objectives of impartial justice according to law.

All this is according to the most enlightened American tradition, which recognizes that each state is an invaluable laboratory of experimentation and effort to improve the processes of administering justice, in the courts and in the fact-finding agencies. Dean Pound's message is not for Maryland alone; it illumines and makes specific the tests which the lawyers and jurists of each state may apply, in evaluating its judicial system and planning the practical steps for further improvements.

The American Bar Association and its various adjuncts, especially its Section of Judicial Administration, have been keenly aware that each state is now a fertile field for

(Continued on page 524)

REVIEW OF RECENT SUPREME COURT DECISIONS

By EDGAR BRONSON TOLMAN*

The Harrison Narcotic Act

Conviction of conspiracy to violate the Harrison Narcotic Act, on proof of long-continued sales by a drug manufacturer to a physician, of morphine sulphate far beyond the average proportion of sale in the trade generally and in excess of the average employment of morphine by physicians cannot be reviewed merely on the doctrine of *U. S. v. Falcone*. Rules of law applicable to traffic in free commodities cannot be made applicable to prohibited traffic in illegal commodities.

Direct Sales Company, Inc. v. U. S., 87 ed. Adv. Ops. 1227; 63 Sup. Ct. Rep. 1265; U. S. Law Week 4467. (No. 593, argued April 12, 1943, decided June 14, 1943.)

Petitioner, Direct Sales Company, Inc., hereafter for brevity called "Company", was convicted of conspiring to violate the Harrison Narcotic Act. The sufficiency of the evidence to sustain the conviction is challenged. The Company is a registered drug manufacturer and wholesaler. It conducts a nationwide mail-order business from Buffalo, New York. This case relates chiefly to its transactions with one Dr. Tate and his dealings with others. Tate was a registered physician, practicing in Calhoun Falls, South Carolina, a community of about 2000 persons. He dispensed illegally vast quantities of morphine sulphate purchased by mail from the Company. The indictment charged the Company, the doctor and three others with conspiring to violate Sections 1 and 2 of the Act for a period extending from 1933 to 1940. One defendant was granted a severance, two pleaded guilty, and the Company and the doctor were convicted. The conviction was affirmed by the circuit court of appeals.

On certiorari the Supreme Court also affirmed. The opinion of the Court was delivered by Mr. Justice RUTLEDGE. The opinion states that the parties are at odds concerning the effect of the *Falcone* decision as applied to the facts proved in this case. The salient facts are stated to be that the Company sold morphine to the doctor in such quantities, so frequently and over so long a period, it must have known he would not dispense the amounts received in lawful practice and was therefore distributing the drugs illegally.

The opinion also reviews the evidence in the record and it is shown that Tate was a small-town physician practicing in a rural section, that his business with the Company was all done by mail, that, although Tate's initial purchases in 1933 were smaller, they gradually increased until from November, 1937, to January, 1940, they amounted to 79,000 one-half grain tablets, and in the last six months of 1939 the Company's shipments to the doctor averaged 5,000 to 6,000 half-grain tablets a month, enough to enable him to give 400 average doses every day.

The opinion also shows that in 1936 the Bureau of Narcotics informed the Company it was being used as a source of supply by convicted physicians, that the average physician would order no more than 200 to 400 quarter-grain tablets annually and requested it to eliminate the listing of 500 lots. It was shown that the directions of the Bureau of Narcotics were acceded to in part only and that various devices were employed to escape from the appearance of transgression without making material changes in the bulk of its transactions.

The facts involved in the *Falcone* case were discussed and differentiated and special emphasis laid upon the fact that in the *Falcone* case commodities sold were articles of free commerce not restricted to sale by order form, registration or other requirements, and the difference is compared to the difference between selling toy pistols and hunting rifles or machine guns. On these differences Mr. Justice RUTLEDGE says:

> This difference is important for two purposes. One is for making certain that the seller knows the buyer's intended illegal use. The other is to show that by the sale he intends to further, promote and cooperate in it. This intent, when given effect by overt act, is the gist of conspiracy.

The case was argued by Mr. William B. Mahoney for the Company and by Mr. Valentine Brookes for the United States.

Soldiers' and Sailors' Civil Relief Act—Litigation By or Against One in Military Service

The Soldiers' and Sailors' Relief Act of 1940 does not fix an inflexible rule to govern in all cases the postponement of litigation during the term of military service. It cannot be construed to require continuances on mere showing of engagement in military service. Its provisions are purposely made flexible, so that the trial court may exercise judicial discretion in preventing any person from taking undue advantage of its provisions.

Boone v. *Lightner et al.*, 87 L. ed. Adv. Ops. 1099; 63 Sup. Ct. Rep. 1223; U. S. Law Week 4441. (No. 698, argued May 3 and 4, 1943, decided June 7, 1943.)

The petitioner Boone, a resident of North Carolina, was appointed by the will of his mother-in-law, executor and trustee of a fund for the education of her grandchildren, including Boone's infant daughter. Shortly after his mother-in-law's death another child was born to Boone and since the will made no provision for that child the father-in-law made arrangements which upon his death put into Boone's hands a fund of $15,000. There was no denial of the existence of a trust. The

*Assisted by JAMES L. HOMIRE.

controversy was as to the character of the trust.

In an action brought by members of the family, Boone was summoned into a North Carolina court to require him to account as trustee of a fund for his minor daughter, to remove him as trustee, to surcharge his accounts for losses caused by illegal management, and to obtain personal judgment for deficiency in the fund. When the summons and complaint were served on Boone personally in North Carolina he was in the military service of the United States. He filed an answer denying the jurisdiction of the court on the ground that he had changed his domicile and legal residence to Washington, D. C., and his daughter's as well. He admitted receipt of the fund in trust but asserted that the trust was a voluntary one not subject to the jurisdiction of the court nor restricted in any way by any terms of any will. When the case came on for hearing his counsel moved for continuance to a specified date on the ground that he, counsel, expected to be called into the service and asked for the postponement in order to give the defendant ample time to employ other counsel. That request was granted and that date peremptorily set for the trial.

When that date came Boone invoked the Soldiers' and Sailors' Relief Act of 1940 and demanded that the trial be continued until after the termination of his service in the army or until "such time as he can properly conduct his defense." The North Carolina court denied the motion, found the issues in favor of the plaintiff and ordered Boone to account. On appeal to the Supreme Court of North Carolina, that judgment was affirmed. Certiorari was allowed because of the federal question whether the state proceedings had been reviewed under circumstances which denied rights given by the Soldiers' and Sailors' Civil Relief Act of 1940. The Supreme Court affirmed the decision.

Mr. Justice JACKSON delivered the opinion. He cited the provisions of Section 201 of the Soldiers' and Sailors' Civil Relief Act which reads:

> "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

Interpreting that Act Mr. Justice JACKSON says:

> 1. The Act cannot be construed to require continuance on mere showing that the defendant was in Washington in the military service. Canons of statutory construction admonish us that we should not needlessly render as meaningless the language which, after authorizing stays, says "unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

The opinion declares that Act to be a substantial reenactment of the Act of 1918. The legislative history of the former Act is therefore reviewed by quoting from a Senate committee's report which declared "There are adequate safeguards incorporated in the bill to prevent any person from taking undue advantage" of its provisions. It is declared that the Court is unable "to ignore or sterilize the clause which plainly vests judicial discretion in the trial court."

Taking up the second question involved in the case, that of the burden of proof, the opinion says:

> 2. The Act makes no express provision as to who must carry the burden of showing that a party will or will not be prejudiced, in pursuance no doubt of its policy of making the law flexible to meet the great variety of situations no legislator and no court is wise enough to foresee. We, too, refrain from declaring any rigid doctrine of burden of proof in this matter, believing that courts called upon to use discretion will usually have enough sound sense to know from what direction their information should be expected to come.

The opinion closes with the following paragraph:

> The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation. The discretion that is vested in trial courts to that end is not to be withheld on nice calculations as to whether prejudice may result from absence, or absence result from the service. Absence when one's rights or liabilities are being adjudged is usually *prima facie* prejudicial. But in some few cases absence may be a policy, instead of the result of military service, and discretion is vested in the courts to see that the immunities of the Act are not put to such unworthy use.

Mr. Justice BLACK filed a dissenting opinion in which he says:

> I fear that today's decision seriously limits the benefits Congress intended to provide in the Soldiers' and Sailors' Civil Relief Act. It apparently gives the Act a liberal construction for the benefit of creditors rather than for the benefit of soldiers. It places in trial judges an enormous discretion to determine from a distance whether a person in military service has exercised proper diligence to secure a leave, or whether it is best for the national defense that he make no application at all. These are questions on which the judiciary has no competence, since only the military authorities can know the answers.

The case was argued by Mr. Milton I. Baldinger for Boone and by Mr. M. R. McCown for Lightner et al.

National Labor Relations Act—Power of Board to Effectuate Statutory Policies

Under the National Labor Relations Act the Board is empowered to take such affirmative action, including the reinstatement of employees with or without back pay, as will effectuate the policies of the Act. The Board's power to take affirmative action is not limited to reinstatement of employees but includes power to order reimbursement of amounts deducted from wages under a check-off system embraced in a collective bargaining agreement made between the employer and a company-fostered union providing for a closed shop with that union and for a check-off of union dues.

Virginia Electric and Power Company v. National Labor Relations Board, 87 L. ed. Adv. Ops. 1135; 63 Sup. Ct. Rep. 1214; U. S. Law Week 4445. (No. 709, decided June 7, 1943.)

The question presented is whether the National

Labor Relations Board in ordering the disestablishment of a company-fostered union may, in the circumstances present here, order reimbursement of dues paid by employees to the union pursuant to individual assignments by the employees and to a union agreement for a closed shop and a check-off of dues.

The circuit court of appeals supported the Board's order and on certiorari the Supreme Court affirmed, in an opinion by Mr. Justice MURPHY. In reaching its conclusion the Court relies on Section 10(c) of the Act authorizing, by the Board, "such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." Declaring that the Board's action should stand in the absence of a showing that it attempts to achieve ends not fairly designed to effectuate the policies of the Act, Mr. Justice MURPHY says:

> The declared policy of the Act in § 1 is to prevent, by encouraging and protecting collective bargaining and full freedom of association for workers, the costly dislocation and interruption of the flow of commerce caused by unnecessary industrial strife and unrest. . . . Within this limit the Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay. . . . The particular means by which the effects of unfair labor practices are to be expunged are matters "for the Board not the courts to determine." . . .
>
> The Board found that the Company was responsible for the creation of the I. O. E. by providing its initial impetus and direction and by contributing support during its critical formative period. It further found that the Company quickly agreed to give its creature closed-shop and check-off privileges "in order to entrench the I. O. E. among the employees and to insure its financial stability." The result was that the employees, under the I. O. E. by-laws, had to authorize wage deductions for dues to remain members of the I. O. E., and they had to remain members to retain their jobs. Thus, as a price of employment they were required by the Company to support an illegal organization which foreclosed their rights to freedom of organization and collective bargaining. . . . An order such as this, which deprives an employer of advantages accruing from a particular method of subverting the Act, is a permissible method of effectuating the statutory policy.

Rejecting the argument that the reimbursement order was for the redress of a private wrong or was penal in character the Court says:

> The instant reimbursement order is not a redress for a private wrong. Like a back pay order it does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices. In this both these types of monetary awards somewhat resemble compensation for private injury, but it must be constantly remembered that both are remedies created by statute—the one explicitly and the other implicitly in the concept of effectuation of the policies of the Act—which are designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private rights. . . . For this reason it is erroneous to characterize this reimbursement order as penal or as the adjudication of a mass tort. It is equally wrong to fetter the Board's discretion by compelling it to observe conventional common law or chancery principles in fashioning such an order, or to force it to inquire into the amount of damages actually sustained. Whether and to what extent such matters should be considered is a complex problem for the Board to decide in the light of its administrative experience and knowledge. The Board has here determined that the employees suffered a definite loss in the amount of the dues deducted from their wages and that the effectuation of the policies of the Act requires reimbursement of those dues in full. We cannot say this considered judgment does not effectuate the statutory purpose.
>
> The argument that the employees received some value from their contributions via the check-off to the Company dominated I. O. E., is based upon the assumption that such an organization necessarily gives some *quid pro quo*. But in view of the purposes of the Act, a contrary assumption, that employees receive no benefit from a type of organization which Congress has characterized as detrimental to the interests of employees and provocative of industrial unrest, is possible. These are considerations for the Board to decide according to its reasoned judgment. We hold that the Board here made an allowable judgment. That judgment cannot be upset by pointing to substantial wage increases which the I. O. E. was granted. As the court below said, "it is manifestly impossible to say that greater benefits might not have been secured if the freedom of choice of a bargaining agent had not been interfered with." . . .
>
> This reimbursement order cannot be labelled "penal." The purpose of the order is not to penalize the Company by requiring repayment of sums it did not retain in its treasury. Those sums did go into the treasury of the Company's creature to accomplish purposes the Company evidently believed to be to its advantage, and the order of reimbursement is intended to remove the effects of this unfair labor practice by restoring to the employees what would not have been taken from them if the Company had not contravened the Act.

Mr. Justice ROBERTS delivered a dissenting opinion in which the CHIEF JUSTICE and Mr. Justice JACKSON concurred. Discussing the principal question as to whether the reimbursement order is justifiable as an appropriate means of effectuating policies of the Act, Mr. Justice ROBERTS said in part:

> This order is supported by findings that, at a time when no union existed, the Company threw its influence in favor of an unaffiliated or company union. All the facts found in this connection relate to a time anterior to the organization of the union. There is no finding, and no facts which would justify a finding, that subsequent to the organization of the union the employer interfered with it, dominated it, or supported it in any manner. The union then organized made demands upon the Company which were the subject of negotiations and out of those negotiations grew an increase of wages totaling about $600,000 per annum and a collective bargaining agreement which contained provisions for a closed shop and for the check-off of union dues, both of which features were demanded and insisted upon by the union. There is no finding and no evidence that the employer in fact inspired, instigated, or coerced the employees to make these demands or had, even remotely, anything to do with them other than they followed its earlier encouragement of the organization of the union. From the day that contract was signed, no act of interference or domination, and no word even of suggestion from the company as to the union policy or practices is shown. The record demonstrates that the employer insisted that the check-off of union dues should be authorized by each employee individually, subject to his

untrammeled right of revocation, and that the closed shop provision should not prevent any member of the company union from also joining any other union of his choice. The fixation of the union dues was a matter within the control of the union members and continuance of check-off as respects any employee was a matter for his voluntary determination so far as the employer was concerned. While it is not denied that the union procured substantial benefits for its members or that it represented them faithfully and fairly, nevertheless, because of the Company's interference at the time of the organization of the union, that organization has been disestablished and indeed has now been dissolved.

It is to be noted that had it not been for the defect which tainted its capacity to represent the employees, its other activities would have been wholly in accordance with the objects and purposes of the National Labor Relations Act. Nothing in that Act invalidates a collective bargaining agreement providing for a closed shop or for a check-off of dues. If in fact those features of the agreement were the voluntary act of the employees, as on this record they must be found to have been, it is difficult to see how the policies of the Act are to be effectuated by repayment to the employees of the dues heretofore paid when such repayment can in no wise benefit the association which has been disestablished.

The company union having been disestablished, the employees are free to form or join any union and make it their bargaining agent. Any possible effect of company influence has been dissipated. The only possible effect of restitution of dues to employees who have not asked for repayment, who have received substantial benefits, from their contribution of dues, is to punish the employer and perchance operate as a warning to other employers that they will similarly be punished for unfair labor practices.

Mr. Justice ROBERTS concludes by saying that, in lieu of writing an opinion, he might have contented himself with a reference to Judge Learned Hand's opinion in *Western Union Telegraph Co.* v. *NLRB,* 113 F. 2d 992, which, he says, "exhaustively and convincingly deals with the subject."

Mr. Justice FRANKFURTER delivered an opinion concurring with Mr. Justice MURPHY. In his opinion Mr. Justice FRANKFURTER distinguishes the present case from the *Western Union* case.

The case was argued by Mr. George D. Gibson and Mr. T. Justin Moore for the Virginia company and by Mr. Robert B. Watts for NLRB.

Fair Labor Standards Act—Scope in Relation to Employees Covered

The Fair Labor Standards Act in its application to employees engaged in commerce, as distinguished from those engaged in the production of goods, extends only to employees actually engaged in or so closely related to the movement of interstate commerce as to be a part of it. Hence, a cook employed by a contractor to furnish meals to section hands of an interstate railroad is not within the scope of the Act.

McLeod v. Threlkeld et al., 87 L. ed. Adv. Ops. 1154; 63 Sup. Ct. Rep. 1248; U. S. Law Week 4457. (No. 787, decided June 7, 1943.)

This case presents a question as to the construction of the Fair Labor Standards Act which, in Section 6, provides that "Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates— . . . "

The employer is a partnership under contract to furnish meals to maintenance-of-way employees of the railroad, an interstate carrier. The meals are served in a car assigned to a gang of workmen, and the car is placed conveniently to the location of the work. The railroad employees pay the partnership for their meals by means of orders authorizing the railroad to deduct their board bill from their wages and to pay the deduction to the contractor. The employee involved in the present controversy was employed by the contractor-partnership as a cook during the period in question.

The district court and the circuit court of appeals both held that the employee did not engage in commerce under the Fair Labor Standards Act. On certiorari this was affirmed by the Supreme Court, by divided bench, in an opinion by Mr. Justice REED. He points out that Congress did not intend that the statutory regulation of hours and wages should extend to the extreme reaches of federal authority as is evidenced by a proposal to have the bill apply to employees "engaged in commerce in any industry affecting commerce" which was rejected in favor of the language of the Act, "each of his employees who is engaged in commerce or in the production of goods for commerce." It is observed that the selection of the smaller group was deliberate and purposeful.

Mr. Justice REED states the Court's conclusion in the following portion of his opinion:

> The test under this present Act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the other phrase, "production of goods for commerce."
>
> It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive. Here the employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from their work. The furnishing of board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other.

Mr. Justice MURPHY delivered a dissenting opinion in which Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE joined.

The dissenting opinion urges that whatever basis there may have been for restricting the scope of the Federal Employers' Liability Act to those actually engaged in transportation those considerations have no bearing on the construction of the Fair Labor Standards Act and, further, that a rejection of the *Smith* case will introduce into the administration of the Fair Labor Standards Act the confusion which characterized the

application of the Liability Act and prompted its amendment in 1939.

The case was argued by Mr. Leon C. Levy for McLeod and by Mr. John P. Bullington for Threlkeld et al.

Employers' Liability Act—Assumption of Risk—Contributory Negligence

In suits under the Federal Employers' Liability Act, prior to its amendment in 1939, assumption of risk constituted a defense to an action for damages whereas contributory negligence operated merely to reduce the damages recoverable by the plaintiff. Where the evidence is such that the jury may find from the facts either assumption of risk by the employee, or merely contributory negligence on his part, it should be left to the jury to determine the issue, and it is error for an appellate court to reverse a judgment on a verdict for plaintiff.

Bertha A. Owens, etc. v. Union Pacific Railroad Company, 87 L. ed. Adv. Ops. 1221; 63 Sup. Ct. Rep. 1271; U. S. Law Week 4469. (No. 580, argued April 7, 1943, decided June 14, 1943.)

Owens, the petitioner's deceased husband, was employed by the railroad as foreman of a switching crew. While engaged in a switching operation he was struck and killed by moving cars that were being "kicked" on to a track in the yard. His widow brought suit in a federal court under the Federal Employers' Liability Act claiming that the death was caused by the railroad company's negligence. The case was submitted to the jury on the sole ground of an alleged violation of Company Rule 30 and on the defenses of the assumption of risk and contributory negligence.

Rule 30 provided: "Engine bell must be rung when an engine is about to move and when approaching or passing public crossings at grade, stations, tunnels and snowsheds."

The jury found for the plaintiff and judgment was entered on the verdict. The court of appeals reversed without considering the question of negligence or of contributory negligence but ruled that, as a matter of law, Owens assumed the risk of death in the activities in which he was engaged.

On certiorari this was reversed by the Supreme Court in an opinion by Mr. Justice RUTLEDGE. The facts are summarized in the opinion. It appears that when the car was "kicked" from the switch on to the track no warning was given to Owens. He started across the track and was run down by the moving cars that were being "kicked" on to the track. Mr. Justice RUTLEDGE observes that, apart from the evidence as to the terms and application of Rule 30, it would be for the jury to determine whether there was negligence on the part of members of the crew not to warn Owens of the impending movement of the cars and whether Owen's conduct amounted to more than contributory negligence, if that. But the railroad sought to avoid the effects of those facts by proving that Rule 30 was not applicable to ordinary switching operations, that it was not customary to ring the bell during them, that it was customary for the switchman to remain at the switch until the movement of "kicked" cars stopped, that it was the practice for another member of the crew to signal for the "kick" without a signal from the switchman or to see that the latter remained at the switch. This conclusion the Supreme Court finds erroneous.

The opinion discusses the broad principles governing the doctrines of assumption of risk, contributory negligence, the fellow-servant rule and their interrelation, saying:

> Recently this Court reviewed "the maze of law which Congress swept into the discard," when in 1939 it amended the Employers' Liability Act to abolish the defense of assumption of risk. In view of the amendment, no good purpose would be served in going over this morass again merely to dispose of this case. But we point to a few lodestars.
>
> The common-law defenses, assumption of risk, contributory negligence, and the fellow-servant rule were originated and developed in common ground. Not entirely identical in conception, they conjoined and overlapped in many applications. The overlapping areas first concealed, then created a confusion which only served to create more; so that in time the three became more, rather than less, indistinguishable. And assumption of risk took over also, in misguided appellation, large regions of the law of negligence. What in fact was absence of departure from due care by the defendant came to be labelled "assumption of risk." Apart from this effect, so long as the area of application was overlapping and each when established had the effect of defeating liability, it was not a matter of great moment to distinguish the defenses sharply or carefully, when the facts would sustain one.
>
> But under the Employers' Liability Act prior to 1939 there was inescapable reason for making accurate differentiation of the three. For each produced different consequences. Assumption of risk remained a complete defense to liability. Contributory negligence merely reduced the damages. The fellow-servant rule was abolished.
>
> These distinct consequences required distinct treatment of the three conceptions. This meant that so far as assumption of risk, which remained a complete defense, had swallowed up contributory negligence and the fellow-servant rule, the latter having different effects, should be withdrawn from its enfolding embrace. In that way only could the clear legislative mandate be carried out and the distinct consequences attributed by it to each be attained. To permit assumption of risk still to engulf all the proper territory of contributory negligence and the fellow-servant rule would be only and plainly to nullify Congress' command.
>
> Unfortunately the injunction has not been followed consistently. There are decisions which, in the guise of applying assumption of risk, do no more than shift to the injured employee the burden of his fellow servants' negligence, while others appear to identify the doctrine with mere contributory negligence. Old confusions die hard. And in this instance some refused to die at all or did so only intermittently. We do not now attempt the refined distinctions or the broader obliterations which might be required, if the 1939 amendment had not become law, in order to give effect to the original Congressional purpose. It is wholly inconsistent with that object and with the statute's wording to hold that the employee, merely by accepting or continuing in the employment, assumes the risk of his fellow servants' negligence or that conduct on his part in a particular situation which amounts to no more than contributory negligence can have that effect.

The case was remanded to the court of appeals for

further proceedings.

Mr. Justice REED dissented because he thought that the evidence showed without contradiction that Rule 30 did not apply to these switching operations and that it was the practice to "kick" the cars without a signal from the man in Owens' position at the switch, and hence that the defense of assumption of risk was good.

The CHIEF JUSTICE and Mr. Justice ROBERTS joined in the dissent.

The case was argued by Mr. Frank C. Hanley for Owens and by Mr. L. R. Hamblen for the Railroad.

Interstate Commerce—Validity of Proportional Rates Applicable to Grain Generally but Inapplicable to Certain Ex-barge Grain

Railroads filed rate schedules discontinuing proportional rates (being lower than local rates) on ex-barge grain moving eastward from Chicago which had been shipped into Chicago by barge over the Illinois Waterways but permitting a continuance of the proportional rates on ex-lake and ex-rail grain. The decision of the Commission refusing permanently to suspend the rate schedules is sustained upon the Commission's view that adoption of the theory advanced in opposition to the challenged schedules would require condemnation of all proportional rates lower than local rates and differing from each other according to the origin of the commodity. The schedules are permitted to stand as carrier-made rates until, in a proper proceeding and on proper showing, they are found unlawful.

The Interstate Commerce Commission et al. v. Inland Waterways Corporation et al., 87 L. ed. Adv. Ops. 1200; 63 Sup. Ct. Rep. 1296; U. S. Law Week 4482. (No. 175, argued January 11 and 12, 1943, decided June 14, 1943.)

The appellants, eastern railroads, filed schedules with the Interstate Commerce Commission purporting to deny to grain arriving at Chicago by barges over the Illinois Waterways, the privilege of moving out of Chicago by rail on "proportional" rates applicable to competitive grain arriving at Chicago by lake steamer or rail. The only other rates on which the ex-barge grain could move east were local rates, which were higher than the existing proportional rates. The proposed schedules were protested by barge lines and others desirous of maintaining existing proportionals as to ex-barge grain.

The Commission suspended the proposed rate schedules and conducted a hearing as to their lawfulness. The record was closed January 26, 1940. On September 18, 1940, the Transportation Act of 1940 was approved. Inland Waterways Corporation then petitioned the Commission to dispose of the proceedings in the light of the new Act. On July 31, 1941, Division 2 of the Commission found that the proportional rates involved had never been applicable on this barge traffic moving on unfiled rates and concluded that the schedules under suspension had not been shown to be unlawful. It announced that the suspension order would be vacated and the proceedings discontinued. Upon a petition for rehearing the whole Commission announced its decision December 1, 1941, and ordered that the suspension order be vacated and the proceedings discontinued.

On January 16, 1942, Inland Waterways Corporation brought suit in the federal district court to enjoin enforcement of the Commission's order. An injunction was granted on the ground that the order discriminated against the water competition by the users of barges.

On direct appeal to the Supreme Court the decree of injunction was reversed in an opinion by Mr. Justice JACKSON. The opinion sets forth in some detail the complicated rate structure to which the proposed schedules related. It appears that grain originating at Chicago, grain brought there by truck, or grain moving under intrastate rates and grain which had forfeited its transit privileges move east from Chicago on local rates, whose validity is not questioned in the case. However, grain originating at certain places distant from Chicago was permitted to move eastward by rail on the lower proportional rates although the grain came to rest in Chicago for marketing or processing. The chief issue in this case is whether grain which moves into Chicago by barge is entitled to move eastward on the proportional rates or must move on the higher local rates.

The questions for decision were, whether it is a violation of Section 2 of the Interstate Commerce Act to charge greater compensation to persons shipping ex-barge grain than is charged other persons shipping ex-rail or ex-lake grain for a "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions" and also whether the imposition of such a charge constitutes violation of Section 3 which forbids undue discrimination, prejudice or advantage by rail carriers to traffic of any other carrier, by water, for example.

In disposing of the contentions of the appellees, Mr. Justice JACKSON summarizes the long history constituting the legal foundation for proportional rates, and points out that since the case had been developed before the Commission on the theory that the proposed schedules must stand or fall as an entirety, no sufficient showing had been made to require that the proposed schedules be struck down, nor, on the other hand, did the Commission's action constitute an approval of those schedules in their entirety.

> Proportional rates so differing and lower than local rates for like outbound transportation have a long history, antedating the Interstate Commerce Act itself. Long hauls have generally been thought entitled to move at a rate less than the sum of the rates for local or short hauls between intermediate points. The practice of routing commodities such as grain to centers for marketing and processing has been widespread and often a necessary feature of the process of distribution. In many instances stopovers for marketing and processing have not been considered as disrupting the continuity of transportation to more distant points, and consequently the grain has been allowed to move on at a rate lower than the outbound rate on grain originating locally and not from a distance. To get the outbound business competing carriers frequently would offer rates similarly computed. Proportional rates established on this reasoning have become deeply embedded in the transportation system of the country, and have been approved by the Interstate Commerce Commission, by the federal courts,

this one included; and, so far as it has spoken on the subject, by Congress itself. We see no reason for repudiating them now.

Having pointed out the error of the protestants' basic contention, the Commission stated that: "It follows that the protestants' allegations cannot be sustained in this proceeding, although in a proper proceeding we might prescribe proportional rates on this ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations." Pending the commencement of such a proceeding it ordered the vacation of the already-expired order of suspension and ordered the discontinuance of the instant proceedings.

Despite this statement, much of the argument in this Court has proceeded upon the assumption that the Commission's order resulted from its belief and findings that the discrepancies between the proportional rates not cancelled in the proposed schedules and the local rates as applied to ex-barge grain were in all respects lawful, and that it actually approved or prescribed a rate structure containing such discrepancies. We do not so understand the action of the Commission.

True, the Commission stated that the railroads "are justified under Section 1 in treating the ex-barge traffic the same as local or ex-truck traffic," and found that "the proposed schedules are shown to be just and reasonable." But this does not constitute a finding that the rates were lawful; they "may lie within the zone of reasonableness and yet result in undue prejudice" or otherwise violate the Act. . . .

The case had been developed before the Commission upon the theory that the proposed schedules must stand or fall in their entirety. There has been no suggestion, nor is it apparent, that it would have been feasible for the Commission to pick and choose among the items in the existing and proposed schedules.

The opinion further points out that the perpetuation of the existing rate structure by sustaining the injunction would entail numerous and serious violations of Section 4 (1).

The opinion also indicates that the record was not developed for disposition of the issues in the light of the Transportation Act of 1940. In this connection Mr. Justice JACKSON says:

> The policy provisions of the Transportation Act of 1940, as well as the specific statutory provisions, provide only standards of considerable generality and some overlapping. It requires administration to "recognize and preserve the inherent advantages of each"—rail, water, and motor transport. It also seeks "sound economic conditions" for all kinds of transportation. . . .

Mr. Justice BLACK delivered a dissenting opinion. He states the basic issue involved as follows:

> The issue in this case is whether the farmers and shippers of the middle west can be compelled by the Interstate Commerce Commission and the railroads to use high priced rail instead of low priced barge transportation for the shipment of grain to the east. I agree that, in the words of Division 2 of the Commission, "this record is replete with complexities and technicalities" which have almost, but I think not quite, successfully obscured that simple issue. The district court, which held that the Interstate Commerce Commission's order "discriminates against water competition by the users of barges" understood the issue. The railroads, which proposed the increase in the cost to barge shippers, also understood the issue as is shown by the frank statement of their representative at the Commission hearing: "We made this proposal, as I have stated several times, and filed these tariffs with the hope that we could drive this business off of the water and back onto the rails where it belongs. . . . We are not in love with water transportation . . . and we believe that we are entitled to that grain business." From behind a verbal camouflage of "complexities and technicalities" there emerges one single easily understandable question: Railroads pick up grain in Chicago which may be brought there by rail, lake transport, or inland waterway barge. Is it lawful for a railroad to deprive midwestern grain farmers and shippers of the benefits of cheap barge transportation by charging a higher tariff for re-shipment of grain originally transported to Chicago by barge than the same railroad charges for re-shipment of the same grain from Chicago to the same places when the grain is brought to the re-shipping point by rail or by lake?

Mr. Justice DOUGLAS and Mr. Justice MURPHY concurred with Mr. Justice BLACK.

Mr. Justice RUTLEDGE did not participate.

The case was argued by Mr. Daniel H. Kunkel for the ICC; by Mr. Frank H. Cole, Jr., for the B. & O. RR. Co.; by Mr. Bryce L. Hamilton and Mr. A. B. Enoch for the Alton RR. Co. and other western carriers; by Mr. Edward B. Hayes for Mechling; by Mr. W. Carroll Hunter for the Secretary of Agriculture, and by Mr. Nuel D. Belnap for the Inland Waterways Corp.

Interstate Commerce—Cut-backs or Refunds by Carrier without Concurrence in Tariff by Other Participating Carriers—Violation of Sections 1(6), 6(4) and 6(7)

Interstate Commerce Commission v. Columbus and Greenville Railway Company, 87 L. ed. Adv. Ops. 1125; 63 Sup. Ct. Rep. 1209; U. S. Law Week 4439. (No. 628, decided June 7, 1943.)

The Columbus and Greenville filed with the Commission its Tariff No. 81 purporting to establish refunds or cut-backs to shippers who shipped cottonseed and its products outbound from mill points, although that carrier had not participated in the inbound shipment. The refund or cut-back is an established practice recognized in cases where the carrier participates in both the outbound and the inbound shipments. The Columbus and Greenville, to provide what it terms "self-help to meet competition," undertook by its tariff to establish the refund on outbound shipments, notwithstanding that it does not share in the inbound. The Commission held that the tariff violates §§ 1 (6), 6 (4) and 6 (7) of the Interstate Commerce Act.

A specially constituted district court of three judges enjoined the Commission's order cancelling the cut-backs. On appeal their ruling was reversed by the Supreme Court in an opinion by Mr. Justice JACKSON, on the ground that the Commission's view that the tariff operated to reduce outbound rates without the concurrence of participating carriers in violation of § 6 (4) is a tenable one, and that under that interpretation the operation also entailed violations of §§ 1 (6) and 6 (7).

Mr. Justice DOUGLAS delivered a concurring opinion.

In this he expresses the view that he inclines to support the judgment of the court below, but votes for reversal on the ground that the case should be returned to the Commission for adequate findings.

Mr. Justice BLACK, Mr. Justice MURPHY, and Mr. Justice RUTLEDGE joined in the opinion of Mr. Justice DOUGLAS.

The case was argued April 7 and 8 by Mr. Daniel W. Knowlton for ICC and by Mr. Robert C. Stovall and Mr. Forrest B. Jackson for the Railroad Company and by Mr. John E. McCullough for Kurn et al.; and reargued May 13 by the same persons except that Mr. Elmer A. Smith argued for Kurn et al., instead of Mr. McCullough.

Federal Statutes—Selective Training and Service Act—Failure to Keep Local Board Advised of Address

Section 11 of the Selective Training and Service Act and Section 641.3 of the regulations do not require a registrant to remain at one place or to notify the local board of every move or every address, permanent or temporary. The regulation is satisfied when the registrant in good faith provides a chain of future addresses by which mail may be reasonably expected to come into his hands in time for compliance.

Bartchy v. U. S., 87 L. ed. Adv. Ops. 1145; 63 Sup. Ct. Rep. 1206; U. S. Law Week 4455. (No. 762, argued May 12, 1943, decided June 7, 1943.)

Bartchy registered at Houston, Texas, under the Selective Training and Service Act, was classed 1-A, given physical examination by the army and on February 4, 1942, was advised by the board that his induction would probably take place in twenty or thirty days.

He sought employment as a merchant seaman for a short coastwise trip, through the National Maritime Union, of which in due course he became a regular member. The offices of that union were in New York City and Houston. A notice was mailed to Bartchy by his local board to report for induction on March 4. The notice was forwarded by the union office at Houston to New York, where Bartchy was at the time, but the notice did not reach him. He did not report, and he was prosecuted and convicted on the charge that he knowingly failed and neglected "to keep his local board advised at all times of the address where mail will reach him."

The circuit court of appeals affirmed the conviction. On certiorari the Supreme Court reversed. The opinion of the Court was delivered by Mr. Justice REED.

The opinion deals with the contention made by the Government that a registrant with knowledge of the imminence of the posting of his notice of induction is required by the regulation "to keep in close communication with the forwarding address." As to this point Mr. Justice REED says:

> If this suggestion is meant as a rule of law that at his peril the registrant must at short intervals inquire at his last address given to the board, here 7543 Harrisburg Boulevard, Houston, or at his own forwarding address, here the Maritime Union in New York, we are of the view that the Government demands more than the regulation requires. The regulation, it seems to us, is satisfied when the registrant, in good faith, provides a chain of forwarding addresses by which mail, sent to the address which is furnished the board, may be by the registrant reasonably expected to come into his hands in time for compliance.
>
> The district court and the court of appeals concluded that the petitioner had not shown diligence in keeping the board advised of his whereabouts and had affirmatively endeavored to avoid delivery of the communication. We do not think either of these inferences is justified by this record.

The CHIEF JUSTICE filed a dissenting opinion, in which Mr. Justice ROBERTS joined. The dissenting opinion is as follows:

> The address which petitioner gave the board was that of the Maritime Union in Houston, Texas. Mail would not reach him there because he was not in Houston. Assuming that a forwarding address to a place where mail would reach him, if forwarded, would satisfy the statutory requirement, mail would not reach him at his forwarding address in Brooklyn, New York, for he was not in Brooklyn in the critical time from February 25 to March 11, during which he knew from the advice of the board that his notice of induction would probably be mailed. He was then living in Hoboken, New Jersey, on the *S. S. American Packard*, on which he had sought employment as a seaman for a voyage of many months to the Far East, and which, pending her sailing, was undergoing repairs in Hoboken.
>
> During that time mail would not reach him in Brooklyn, for he was at no time in Brooklyn, and he at no time went or sent there for mail, or inquired whether mail had come for him. Mail would not reach him in Hoboken or on the *American Packard*, or "in New York Harbor," because he had not given either as a forwarding address or given instructions to any one that mail be sent or delivered him at either place. The courts below were justified in concluding that during a period of some weeks, when he expected to receive the notice of the draft board, and when he was preparing to leave the country for a period of months, he knowingly failed to keep the board advised of any address where mail would reach him.

The case was argued by Mr. Bernard A. Golding for Bartchy and by Mr. Valentine Brookes for the United States.

Indian Law—State Taxation of Indian Property

The statute of the State of Oklahoma imposing inheritance taxes on the estates of certain deceased members of the Five Civilized Tribes on cash and securities held for the Indians by the Secretary of the Interior is valid, and the government is entitled to recover from the state taxing authorities inheritance taxes on that class of property.

Land purchased for deceased Indians from those funds is also taxable at the time of death. Lands specifically exempt from direct taxation and lands inherited by a deceased Indian are not subject to state inheritance taxes.

Oklahoma Tax Commission v. *U. S.*, 87 L. ed. Adv. Ops. 1233; 63 Sup. Ct. Rep. 1284; U. S. Law Week 4491. (Nos. 623, 624 and 625, argued April 9, 1943, decided June 14, 1943.)

This case was brought by the government to recover inheritance taxes imposed by the State of Oklahoma upon the transfer of the estates of three deceased members of the Five Civilized Tribes and paid under protest by the Secretary of the Interior from funds under his

control belonging to those estates. The district court entered judgment on the merits for the state in each case, holding the property not taxable. The circuit court of appeals reversed. Certiorari was granted, and the judgment of the circuit court of appeals was reversed.

The opinion of the Court was delivered by Mr. Justice BLACK. He states that the basic questions to be decided in each of these cases are whether, as a matter of state law, the state taxing statutes reach the estates and whether Congress has taken from the State of Oklahoma the power to levy taxes upon the transfer of all or a part of property and funds of these deceased Indians.

It had been contended that Oklahoma did not intend to tax the estates of the members of the Five Civilized Tribes. In regard to that contention Mr. Justice BLACK says:

> We cannot agree with this view. The two controlling statutes broadly provide for a tax upon all transfers made in contemplation of death or intended to take effect after death as well as transfers "by will or the intestate laws of this state." The language of the statutes does not except either Indians or any other persons from their scope.

The leading decisions of the Oklahoma courts and the pertinent decisions of the Supreme Court of the United States on this question are reviewed and Mr. Justice BLACK says:

> The district court held that the state law does apply to these estates. This interpretation is consistent with that given by the state administrative authorities, with the language of the acts themselves and with the state court's holding in *Childers* v. *Pope*.

The government's second and major contention was that the state may not impose an estate tax upon the transfer of the restricted cash and securities because Congress by placing restrictions upon this property manifested a purpose to exempt it from Oklahoma estate taxes. . . . On this point Mr. Justice BLACK says:

> We conclude that this Act does not exempt the restricted property from taxation for two reasons: (1) the legislative history of the Act refutes the contention that an exemption was intended; and (2) application of the normal rule against tax exemption by statutory implication prevents our reading such an implication into the Act. . . .

Mr. Justice BLACK says:

> It is true that our interpretation of the 1933 statute must be in accord with the generous and protective spirit which the United States properly feels toward its Indian wards, but we cannot assume that Congress will choose to aid the Indians by permanently granting them immunity from taxes which they are as able as other citizens to pay. It runs counter to any traditional concept of the guardian and ward relationship to suppose that a ward should be exempted from taxation by the nature of his status, and the fact that the federal government is the guardian of its Indian wards is no reason, by itself, why a state should be precluded from taxing the estate of the Indian. . . . Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes.

The opinion declares that the validity of the taxes on the transfer of the land presents a somewhat different problem. As to the taxation of land Mr. Justice BLACK says:

> A majority of the Court concludes that this principle does not apply to Indian lands specifically exempted from direct taxation. We therefore hold that the transfer of those lands which Congress has exempted from direct taxation by the state are also exempted from estate taxes.

Mr. Justice DOUGLAS concurred in the result and in the disposition of the case.

Mr. Justice MURPHY dissented in part. The following excerpts from his opinion indicate the basis and the extent of his dissent:

> I dissent because the opinion of the Court rejects a century and a half of history. We are not here dealing with mere property or income that is tax exempt. This is not the ordinary case of government and its citizens, or a group of citizens who seek to avoid their obligations. Our concern here is entirely different. It is with a people who are our wards and towards whom Congress has fashioned a policy of protection due to obligations well known to all of us. It rests with Congress to choose when we are done with that trusteeship. Meanwhile it is our obligation to interpret in the light of the history of that relationship all legislation which Congress has enacted to carry out its Indian policy.
>
> • • •
>
> It is not our function to speculate whether it is wise at this late date to relieve from the ordinary burden of taxation Indians who enjoy the privileges of citizenship and who in some instances are persons of substantial means. Nor is it our legitimate concern that grants of tax exemption to Indian inhabitants may create serious fiscal problems in some states or in their local governmental subdivisions. Those matters, as well as the character, extent and duration of tax exemptions for the Indians, are questions of policy for the consideration of Congress, not the courts.
>
> • • •
>
> The CHIEF JUSTICE, Mr. Justice REED and Mr. Justice FRANKFURTER join in this dissent.

The case was argued by Mr. A. L. Herr and Mr. Clifford W. King for the Oklahoma Tax Commission and by Mr. Warner W. Gardner for the United States.

Indian Law—Taxation

An Indian citizen of mixed blood may consent to the levy of county taxes upon his allotment where the land taxed is situated in a county wholly within an Indian reservation.

County of Mahnomen v. U. S., 87 L. ed. Adv. Ops. 1130; 63 Sup. Ct. Rep. 1254; U. S. Law Week 4460. (No. 684, argued May 4, 1943, decided June 7, 1943.)

Action was brought by the government in a federal district court to recover real estate taxes alleged to have been illegally collected by Mahnomen County, Minnesota, from an Indian allottee. The district court rendered judgment against the County for taxes paid from 1911 to 1921, inclusive. On appeal by the government and the County, the Circuit Court of Appeals, Ninth Circuit, affirmed the judgment and gave an added judgment for the years 1922 through 1925.

In its petition for certiorari, the County claimed that Garden was an emancipated Indian who had paid the taxes voluntarily and the judgment granting a refund

was therefore erroneous, under the doctrine of *Ward v. Love County*, 253 U. S. 17. The County also contended that the whole County was within an Indian reservation, that it had long been dependent upon taxation of allotted lands, and that after the passage of the first Clapp Amendment, which emancipated the Mahnomen County Indians and lifted all restrictions as to the sale, encumbrance, or taxation for allotments, the County had assumed that the Indians could voluntarily contribute to the support of the County institutions.

The Supreme Court on certiorari reversed both judgments. The opinion of the Court was delivered by Mr Justice BLACK. He reviews the cases on which the gov ernment relies, examines the relevant legislation and its history and says:

> Acceptance of *Choate* v. *Trapp* does not mean that an Indian, legislatively declared to be competent to handle his own affairs, cannot voluntarily decide to pay taxes for his own advantage and welfare. If, as the petitioner argued, and as the government does not deny, the capacity of the County to provide schools, roads, and other necessary services would have been seriously jeopardized, if not destroyed, by the failure of the Indians to contribute to a tax fund, their newly granted emancipation would have been of little value. In addition, the market value of their lands would have been greatly reduced by the complete inability of the County to secure funds essential to the establishment of means of travel and communication and the maintenance of an orderly society.

Mr. Justice FRANKFURTER and Mr. Justice RUTLEDGE concurred in the result.

Mr. Justice MURPHY filed a dissenting opinion, in which he declared that the prevailing opinion of the Court "takes too narrow a view of our obligations to our Indian citizens."

The case was argued by Mr. L. A. Wilson and Mr. George B. Sjoselius for the County and by Mr. Vernon L. Wilkinson for the United States.

Appeals to Supreme Court Limited by Judiciary Act of 1925

The United States of America v. Belt et al., 87 L. ed. Adv. Ops. 1161; 63 Sup. Ct. Rep. 1278; U. S. Law Week 4445. (No. 919, decided June 7, 1932.)

In this case the Government took a direct appeal under the Act of April 27, 1912, in a suit brought to establish title to land adjacent to the Anacostia River. The district court for the District of Columbia gave judgment for the defendant. The Government appeals under § 5 of the Act which provides: "That from the final decree of the Supreme Court of the District of Columbia . . . an appeal shall be allowed to the United States, and to any other party in the cause complaining of such decree, to the Supreme Court of the United States. . . . "

The Supreme Court in an opinion by Mr. Justice FRANKFURTER holds that provisions for direct review by the Supreme Court provided for in § 5 of the Act of 1912 were repealed by § 13 of the Judiciary Act of 1925. The judgment under appeal was vacated and the cause remanded to the district court to enable the Government, if it so desires, to perfect a timely appeal to the court of appeals for the District of Columbia.

Mr. Justice DOUGLAS and Mr. Justice MURPHY dissent.

The case was argued by Solicitor General Fahy and by Mr. Alexander H. Bell, Jr., for the U. S., and by Mr. Milton D. Campbell and Mr. Walter M. Bastian for Belt et al.

Practice—Appeals to Supreme Court—Time Limit on Application for Leave to Appeal

Harold E. Cole v. Abel J. Violette et al., 87 L. ed. Adv. Ops. 1247; 63 Sup. Ct. Rep. 1204; U. S. Law Week 4499. (No. 892, decided June 14, 1943.)

In a *per curiam* opinion the Court considers the question whether an appeal was applied for within the three months' period provided by law. The appeal was from the superior court of Suffolk County, Massachusetts, which had entered a decree dismissing the case on a rescript from the Supreme Judicial Court directing that the bill be dismissed. The latter's ruling was made on December 4, 1942, but the actual decree by the superior court was not entered under the direction until January 7, 1943. The United States Supreme Court ruled that the time for application for an allowance of appeal ran from December 4, 1942, rather than from January 7, 1943, because the order of the Supreme Judicial Court was of the same nature and with the same incidents as those of the highest courts of other states and one which finally disposed of all the issues in the case leaving nothing to be done by the trial court but the ministerial act of entering judgment.

Patents—Invention and Anticipation—Disclaimer—Reconsideration before Final Decree

Marconi patent 763,772 and Fleming patent 803,684 were both held invalid, the first because it lacked invention over the disclosure, implicit as well as explicit, of a prior patent, and the second because the patentee's claim for more than he invented was not inadvertent and there was unreasonable delay in making disclaimer thereof. It was also held that the Court of Claims could, in the exercise of its discretion, at any time prior to the entry of its final judgment reconsider any portion of its decision and reopen any part of case.

[*Editorial Note: This is the case in which Mr. Justice Frankfurter said: "It is an old observation that the training of Anglo-American judges ill fits them to discharge the duties cast upon them by patent legislation." Prompted by that suggestion of the judicial difficulties, the reviewer asked John D. Myers, Philadelphia, incoming chairman of the Patent, Trade-Mark and Copyright Law Section, to write this review.*]

Marconi Wireless Telegraph Co. of America v. *U.S.; U.S.* v. *Marconi etc. Co.*, 87 L. Ed. Adv. Ops. 1296; 63 Sup. Ct. Rep. 1393; U.S. Law Week 4522. (Nos. 369 and 373, argued April 9 and 12, 1943, decided June 21, 1943.)

The Marconi Company brought this suit in 1919 in the Court of Claims pursuant to 35 U.S.C. §68, to recover for the alleged infringement of four patents, including Marconi patent No. 763,772 and Fleming patent No. 803,684.

The Court of Claims held Claim 16 of the Marconi patent valid and infringed but held invalid the other claims thereof in suit, and further held the Fleming patent invalid and not infringed.

The case came to the Supreme Court on certiorari to review these holdings, no review being sought of so much of the Court of Claims' judgment as dealt with the other two patents there in suit. The Supreme Court affirmed the judgment below holding invalid the broad claims of the Marconi patent, that is, the claims in suit other than Claim 16, and affirmed the judgment holding the Fleming patent invalid. The judgment holding Claim 16 of the Marconi patent valid and infringed, was vacated and the cause remanded for further proceedings.

The opinion of the Court was delivered by the CHIEF JUSTICE.

As to the Marconi patent, the Court stated the invention to be a structure and arrangement of four high frequency circuits, with means of independently adjusting each so that all four may be brought into electrical resonance with one another. The principal question was whether such an arrangement disclosed invention over Stone patent No. 714,756. The Marconi Company claimed that it did, since Marconi explicitly claimed four circuit tuning before Stone had made it explicit by his 1902 amendment, and since Marconi disclosed means of adjusting the tuning of each of his four circuits, whereas Stone had explicitly shown adjustable tuning only in the two closed circuits. The Court overruled the Marconi Company's contention, holding:

> We think that Stone's original application sufficiently disclosed the desirability that the antenna circuits in transmitter and receiver be resonant to the same frequency as the closed circuits, as he expressly recommended in his patent. But in any event it is plain that no departure from or improper addition to the specifications was involved in the 1902 amendments, which merely made explicit what was already implicit.
>
> • • •
>
> As the result of such study we are forced to conclude . . . that the Court of Claims was right in deciding that Stone anticipated Marconi, and that Marconi's patent did not disclose invention over Stone.

Passing to Claim 16 of the Marconi patent, the Court referred to certain prior patents bearing on the validity and construction of that claim, which had not been passed upon by the lower court, even though before it, when it rendered its interlocutory decision holding Claim 16 valid and infringed. On the accounting the Government had requested a finding of non-infringement in view of such patents, but this had been rejected by the lower court. The basis of such rejection not being clear, the Court vacated the judgment as to Claim 16 and remanded the cause for further proceedings, holding:

> Hence the court did not lack power at any time prior to entry of its final judgment at the close of the accounting to reconsider any portion of its decision and reopen any part of the case. . . .
>
> Whether it should have taken any of these courses was a matter primarily for its discretion, to be exercised in the light of various considerations. . . .

On the remand, the lower court was also ordered to make findings as to the measure of damages, in the light of the recognized doctrine that if a defendant has added non-infringing and valuable improvements which have contributed to the making of the profits, it is not liable for benefits resulting from such improvements.

The invention of the Fleming patent is a vacuum tube device for converting alternating electric currents, especially those of high frequency, into continuous electric currents. Claims 1 and 37 were in suit. Claim 37 describes the tube as being used "in a system of wireless telegraphy employing electrical oscillations of high frequency". No such limitation was placed on Claim 1 as originally claimed, and the specifications plainly contemplated the use of the claimed device with low as well as high frequency currents. However, by a disclaimer filed ten years after the issuance of the patent, Claim 1 was restricted to high frequency alternating currents.

The Court held that the court below was correct in holding the patent invalid because Fleming's claim for more than he had invented was not inadvertent, and his delay in making the disclaimer was unreasonable, and said:

> Fleming's paper of 1890 showed his own recognition that his claim of use of his patent for low frequency currents was anticipated by Edison and others. It taxes credulity to suppose, in the face of this publication, that Fleming's claim for use of the Edison tube with low frequency currents was made "through inadvertence, accident or mistake", which is prerequisite to a lawful disclaimer.

A favorable attitude toward the broad claims of the Marconi patent was expressed in dissenting opinions filed by Mr. Justice FRANKFURTER and Mr. Justice RUTLEDGE. In Mr. Justice FRANKFURTER's dissent, concurred in by Mr. Justice ROBERTS, he says:

> To find in 1943 that what Marconi did really did not promote the progress of science because it had been anticipated is more than a mirage of hindsight. . . . And yet, because a judge of unusual capacity for understanding scientific matters is, by a process of intricate ratiocination, able to demonstrate that anyone could have drawn precisely the inferences that Marconi drew and that Stone hinted at them on paper, the Court finds that Marconi's patent was invalid although nobody except Marconi did in fact draw the right inferences that were embodied into a workable boon for mankind. For me it speaks volumes that it should have taken forty years to reveal the fatal bearing of Stone's relation to Marconi's achievement by a retrospective reading of his application to mean this rather than that. This is for me, and I say it with much diffidence, too easy a transition from what was not to what became.

The case was argued by Mr. Stephen H. Philbin for the Marconi Company, and by Mr. Assistant Attorney General Shea for the United States.

Errata

Freeman v. Bee Machine Co., (ABAJ, July 1943, pp. 408, 409). In the eighth line of the syllabus strike "properly denied" and substitute "not precluded merely."

BENJAMIN HARRISON

Man of the Law, Soldier of the Republic and Gentleman in Politics*

By GEORGE R. FARNUM
Of Boston
Former Assistant Attorney General of the United States

"EVERY man," declared Emerson, "is a bundle of his ancestors." Our twenty-third President could boast a notable one. It has been asserted that his line went back to the intrepid Cromwellian soldier, Thomas Harrison, who gave an excellent account of himself in the Roundhead battalion, voted the death of Charles, and was himself executed in the sequel. It has been further claimed that among his ancestors was the historically glamorous Pocahontas. In any event, the Revolutionary soldier, signer of the Declaration of Independence, and Governor of Virginia, Benjamin Harrison, begat William Henry Harrison, of Tippecanoe fame, who became in the aftermath President of the United States. William Henry begat Benjamin, a gentleman farmer and member of Congress. The latter, in turn, begat the Benjamin with whom this sketch is concerned, and who was born at North Bend, Ohio, in 1833. His mother was of New England descent and in many ways he was more the product of that part of the country than a Virginia Harrison, which he wished to be considered. It has been said that "if there is a place in the world where the New Englander is more of a New Englander than he is in New England, it is in the Western Reserve of Ohio."

The boy grew up on his father's farm, energized and disciplined by enforced toil in the open air. His first instruction was in the log school house of the district. From there he passed—first to Farmers (later Belmont) College and finally to Miami University, from which he graduated in 1852.

After leaving Miami, Harrison entered the office of Judge Belamy Storer of Cincinnati, where he assiduously poured over law books for the next two years. On passing the bar he removed to Indianapolis, secured desk room in the office of the clerk of the United States District Court, and to help meet expenses until clients had made a beaten path to his door, obtained an appointment as court crier at $2.50 a day. He possessed the qualities which assure success in the profession—personal integrity, a high sense of professional honor, the capacity for hard and sustained work, a keen and ready mind, acute analytical powers, a memory of great retentiveness, and the ability to express himself with brevity, force and clarity. As a result he gradually rose to a position of preeminence at the Indiana Bar. In 1857 he was elected city attorney of Indianapolis and in 1860 reporter of the Indiana Supreme Court. This last office he lost on his acceptance of an Army commission but regained in 1864.

With the coming of the war, Harrison enlisted as a second lieutenant in the 70th Indiana Infantry and was promoted to colonel before the regiment left for the front. As William Allen White put it, "He went at tactics with the brain of a soldier, the heart of a gentleman, and the energy of an ambitious little beaver." "Little Ben," as he came to be called by his men, served in the Atlanta Campaign, fighting with conspicuous bravery at Resaca, Kenesaw Mountain and Peach Tree Creek. In recommending him for the rank of brigadier general, Hooker wrote: "My attention was first attracted to this young officer by the superior excellence of his brigade in discipline and instruction, the result of his labor, skill and devotion. With more foresight than I have witnessed in any officer of his experience, he seemed to act upon the principle that success depended upon the thorough preparation in discipline and esprit of his command for conflict, more than on any influence that could be exerted on the field itself, and when collision came his command vindicated his wisdom as much as his valor. . . . Colonel Harrison is an officer of superior abilities, and of great professional and personal worth." He received the merited promotion.

In 1876 Harrison was precipitated into the Indiana gubernatorial contest to succeed the original nominee who withdrew during the heat of the campaign. Though defeated, he added to his growing prestige by leading his ticket. After having served on the Mississippi River Commission, to which he was appointed by President Hayes, he was elected, on a reform wave, to the United States Senate in 1881. His senatorial career was marked by no conspicuous achievements. He remained somewhat aloof, worked hard in his quiet, efficient way, kept his hands clean and his name untarnished, and came out with an enhanced reputation for civic righteousness. Midway in his term he wrote a Philadelphia banker, who suggested him for the presidency, "My own public life has been brief and inconspicuous. I have never sought occasions for display

*This is the tenth in a series of biographical studies of eminent soldier-lawyers written by Mr. Farnum for the JOURNAL.

or attempted to do anything brilliant or for applause. A somewhat prosy—perhaps stupid—habit of trying to discharge quietly, but to my best, such few public duties as have been cast upon me, is hardly likely to make me 'Presidential Timber.'" Evidently the politically astute and ambitious wife of James G. Blaine was a better judge. Two years earlier she had written to her daughter, "There was Ben Harrison, who was to speak here Tuesday evening, who is very likely to be the next presidential Republican nominee."

The Republican convention of 1888 was split between numerous candidates, and fate would have it that, after three days of balloting, the nomination fell by way of compromise to the quiet, capable and religious Indianian—he of the unsullied record. In the ensuing election he defeated Cleveland, incidentally receiving, of all things, Tammany's gift of the electoral votes of New York. Greeting Matthew Quay, National Republican Chairman, who journeyed to Indianapolis with a Cabinet slate, Harrison exclaimed, "Providence has given us the victory." The sophisticated Quay, who knew something of the part the resources of Mammon had played in the election, disgustingly exclaimed to a friend, "Think of that man! He ought to know that Providence hadn't a damn thing to do with it." There was much of the character of the man reflected in the simple words he uttered from the rear platform of the inaugural train to those of his fellow citizens of Indianapolis who had gathered to bid him God's speed. "There is a great sense of loneliness in the discharge of high public duties. The moment of decision is one of isolation," adding, "But there is one whose help comes even into the quiet chamber of judgment, and to His wise and unfailing guidance will I look for direction and safety."

Shortly after the election, in a letter written to Blaine, Harrison confided that he felt "a very serious sense of grave responsibility and shadowy troubles." The problem of dealing with Blaine was one of his first perplexities. However, being mindful of his indebtedness to Blaine for the nomination, Harrison made him Secretary of State. Their relations constitute a dramatic chapter in American political history, but space does not permit the telling of it here. In many ways they recall the relations between Lincoln and Seward. In this connection, a passage in a Lincoln Day address which Harrison delivered years afterwards has a peculiar interest. "The selection of Mr. Seward for Secretary of State," he declared, "was a brave act, because Mr. Lincoln could not fail to know that for a time Mr. Seward would overshadow him in the popular estimation, and a wise one, because Mr. Seward was in the highest degree qualified for the great and delicate duties of the office. A man who is endowed for the presidency will know how to be President in fact as well as in name, without any fussy self-assertion."

Harrison brought to the presidency his great capacity for slavish toil and his habits of painful thoroughness. On one occasion Mrs. Blaine wrote her son, "I found the President here going over the Samoan dispatches with your father. He sat all crumpled up, his nose and his boots and his gloves almost meeting, but he was examining those dispatches with care and great intelligence, and although I am not drawn to him, I cannot refuse him the homage of respect." He conducted his office for the most part with political sagacity, personal courage and unshaken firmness. While he may not go down in history as an outstanding political leader, he rendered greater public service than is popularly accredited him.

In 1892 Harrison was renominated by his party. Cleveland, whom he had defeated for reelection four years before, now turned the tables on him. Three months before his death he whimsically observed, "The decapitation of the ex-president when the oath of office has been administered to his successor, would greatly vivify a somewhat tiresome ceremonial. And we may some time solve the newspaper problem, what to do with our ex-presidents, in that conclusive way. Until then I hope an ex-president may be permitted to lie somewhere midway between the house of gossip and the crypt of the mummy." Harrison was not the man, however, to rest on past laurels and let his great talents lie fallow. Returning to Indianapolis, he resumed the practice of law, and was retained in many important cases. His most notable was as senior counsel for Venezuela before the Arbitration Tribunal in Paris in her boundary dispute with England. He worked on the matter for two years. His closing argument, which consumed twenty-five hours in the aggregate, was acclaimed a masterful performance. He, himself, as he said of Garfield, never ceased to be a student and instructor. He was ever avid to learn and always inspired to share his ripe wisdom with others. Amid the exactions of his professional work he found time to deliver many public addresses, contribute to magazines and write one book on the structure and functions of our government.

One who knew him well has recorded this impression of his appearance. He "was in stature a small man. He was what, in horses, would be known as an undersized, pony-built sorrel. He did not look either strong or healthy. His hair and beard and eyelashes were sandy and had a sunburned look. He was dish-faced, and his eyes were small, bright and with a cunning look that gave him little outward expression of the great power which the man unquestionably possessed. His form was not imposing. He was generally attired in a black, double-breasted coat, buttoned across an obtrusive up-standing little stomach. He showed an inclination to round shoulders, and stood reared back, creating the impression of a small man trying to look large."

There was a detachment about him characteristic of men of deep moral seriousness and studious hab-

(Continued on page 527)

AMERICAN BAR ASSOCIATION TO SPONSOR TAX COURSES FOR GENERAL PRACTITIONERS

By WESTON VERNON, JR.
Chairman, Section of Taxation

THE constantly increasing importance of our complex federal tax system and the need by general practitioners for a basic knowledge of taxation have prompted the Section of Taxation, with the approval of the Board of Governors, to sponsor a comprehensive course of lectures on the Fundamentals of Federal Taxation to be given this fall and winter in many cities throughout the United States. The purpose of the course is to provide lawyers with a basic working knowledge of federal taxation from both the substantive and procedural aspects.

The Section of Taxation is now making arrangements with various bar associations to conduct the courses in their cities. Letters have been sent to state and local bar associations inviting them to participate. Any member of the American Bar Association wishing to have a course conducted in his city is requested to get in touch with officials of the state or local bar association of which he is a member and suggest that arrangements be made for conducting the lecture course in his locality.

Requests have come to the American Bar Association from all parts of the United States for aid to practitioners in familiarizing themselves with the tax laws. A working familiarity with the tax laws is needed to advise clients in the preparation of their income tax returns and also in order to avoid subjecting clients to unnecessarily large taxes in connection with the organization of new businesses, the sale of property, the disposition of their estates and many other phases of the work of general practitioners. From some quarters have come complaints that non-lawyers have been permitted to practice in this field. The Association's Committee on Unauthorized Practice reached the conclusion that until larger numbers of lawyers throughout the United States were trained in tax work, clients would naturally entrust their tax work to persons most familiar with this field, whether or not such persons were lawyers.

With the approval of the Board of Governors, the Practising Law Institute which has been successful in conducting courses for lawyers, was invited to cooperate in formulating a practical comprehensive course of lectures on the fundamentals of federal taxation for general practitioners. A group of over twenty tax experts, including men who have had extensive experience in lecturing on taxation, have worked out the content of a worthwhile lecture course. While the program must be flexible enough to meet the needs of each community in which the course is given, it is planned to have the course consist of twelve lectures of two hours each and to be given one evening a week commencing in October and ending in February. The course will cover federal income, estate, gift and excess profits taxes, the principal topics being as follows: Items of gross income; deductions from gross income; exemptions and credits of individuals; pay-as-you-go problems; accounting methods; computation of the tax; capital gains and losses; sales and exchanges; corporation taxes; taxation of the income of partnerships, estates and trusts; the excess profits tax; estate and gift taxes; types of taxpayers, and tax practice and procedure. Throughout the course particular attention will be given to the preparation of tax returns. The tax problems of typical taxpayers will be presented and, where such instruction is desired, tax returns prepared by members of the class will be analyzed and corrected in clinic sessions supplementing the lectures. A lecture by the local Collector of Internal Revenue on how the Bureau of Internal Revenue handles tax returns will be added to the program, where possible. The Current Tax Payment Act of 1943, as well as any subsequent amendments to the Revenue Code, will be covered.

In order to make this instruction available to lawyers in smaller communities where the tax lectures may not be given, printed summaries of the lectures are being prepared by a group of tax specialists. These printed lectures will endeavor to present in clear, readable fashion, the highlights of the tax laws, and will warn against the pitfalls which confront the unwary.

In order that this program may be efficiently conducted and may be self-sustaining on the financial side, a tuition fee of $25 will be charged those who attend the lecture courses. The subscription fee for the printed lectures will be $10, which will pay the cost of mailing one lecture each week to the subscribers. Those who enroll in the lecture course will receive the printed lectures without additional charge and in advance of each lecture. This will permit the lecturers to devote their maximum attention to the analysis of typical tax problems and to avoid discussions of subjects which can be covered more adequately in printed form. Bibliographical, citation and other source materials will also be furnished.

It is contemplated that in each city a committee des-

ignated by the local bar association will be in charge of the course. This committee, together with those who are to lecture in that city, will make such modifications in arrangements and subject-matter of the course as may be advisable to meet local conditions. The committee will also be in charge of publicizing the course and handling enrollments. Representatives of the Practising Law Institute will be available to meet with these committees and furnish suggestions growing out of the Institute's experience. The Section of Taxation and its members will cooperate in the lecture courses in every possible way.

The Practising Law Institute will contribute to the project the successful techniques and methods which have been developed during the past ten years' experience in conducting courses for practising lawyers. The Institute will assume financial responsibility for the course. If any income results it will be devoted by the Practising Law Institute to further the development of similar programs not only in taxation but in other fields of practise. The Institute was organized at the suggestion of Harold P. Seligson as the result of a study made by the Association of the Bar of the City of New York of post-graduate study in our profession and in medicine, banking and other fields. The Institute is chartered by the New York State Education Department as a non-profit educational corporation. Its trustees include judges, law school professors and prominent leaders in the profession who are interested in legal education. The Institute now conducts in New York City sixteen or more courses for lawyers covering each of the major fields of practise. Over 1500 New York lawyers attend these courses each year and most of the larger New York law firms subscribe for the Institute's courses for their entire staffs. The Institute has also conducted courses in cooperation with local bar associations in nine other cities.

It is the hope of the persons in charge of the program that the lecture course will afford many lawyers an opportunity to familiarize themselves with the fundamentals of federal taxation so they may increase the sphere of their professional activities.

A Note for Lawyers on the New Income Tax Law and the Fiscal Year

IN my articles on *Law Office Organization* I recommended a fiscal year ending June 30 for a variety of reasons that seemed to me sound entirely from the point of view of a lawyer's internal office accounting.

Now the 1943 Revenue Act has supplied a further reason. On September 15, 1943, a lawyer must estimate his taxable income. He can revise that on December 15, 1943.

Almost all lawyers report taxable income on a calendar year basis. How can a lawyer estimate his income within 80% of accuracy? If he fails, he is to be penalized.

Most of us earn our living from a variety of small cases. Once in a while a big one comes our way. If the Fates are kind, that one case may, in one taxable year, double our income.

How can we estimate whether or not we shall win? Even the Supreme Court of the United States has been known to reverse itself. If we win in a lower court, how can we tell if there will be an appeal and, perhaps, a supersedeas. Even if we have won, how do we know when the court will enter its judgment?

After we have finally won, how can we know whether the client may pay us December 31, 1943, or January 2, 1944?

The lawyer can obviate these problems—the wrong answer to which will cost him real money.

The first answer is to go on an accrual basis, as I have tried to make plain in the articles on *Law Office Organization*. Then the *date of the bill* and not the date of payment is the controlling factor for tax purposes.

The second answer is a partnership fiscal year ending June 30. On or prior to December 15 the lawyer's final estimate for the year must be filed. If his firm is on a June 30 fiscal year basis, his income for the calendar year, as a lawyer, is then fixed and he has ample time in which to revise his March 15 and June 15 estimates.

If he has additional income from trust funds or outside investments, he must compute those himself. Except in rare cases, such income is not apt to vary much, or at least he can estimate it. It is his professional income that may vary largely. Partly this is because of circumstances entirely beyond his control; partly because of circumstances he has himself failed to control.

On the June 30 fiscal year accrual basis he has absolute control of the figures pertaining to his professional income. The rest is easy.

REGINALD HEBER SMITH

BOOK REVIEWS

The Judicial Function in Federal Administrative Agencies, by Joseph P. Chamberlain, Noel T. Dowling and Paul R. Hays. 1942. New York: The Commonwealth Fund. Pp. 234, plus bibliography, tables of cases and statutes, and index.—This compact volume, by three professors of law at Columbia University, undertakes to deal with the field of federal administrative law, excluding the making of rules and regulations by administrative agencies. It is organized under four heads or chapters: (I) methods of administrative adjudication, (II) the means whereby administrative agencies express policy, (III) a description of the nature and variety of administrative sanctions, and (IV) the relations of agencies to courts. The authors state that the monographs of the Attorney General's Committee on Administrative Procedure were used as a basis for this study, but they have added a good deal of legal material and have approached the subject in a comparative fashion rather than in the "vertical" or single-agency single-function manner of the monographs. In fact, such defects as may appear in the volume may be the result of too much reliance upon the monographs and report of the Attorney General's Committee. The book is very valuable, but must be read with an informed and critical eye.

Lawyers will explore this book from the point of view of their own needs. So viewed, the volume has two chief characteristics. *First*, while its distinguished authors are teachers of law, they have produced a volume more in the vein of political science than in the style of law books—a result due, no doubt, in part to the nature of the subject and in part to the disinclination of present writers to treat the field as one of law even when writing upon so legalistic a subject as *The Judicial Function in Federal Administrative Agencies*. *Secondly*, the exclusion of the subject of administrative rule-making from the study results not only in the description of only half the animal but omits essential organs in the anatomy of the administrative process—for rules and adjudications work hand in hand to produce the administrative result as the authors either tacitly or specifically acknowledge throughout the book. The adjudicative process, moreover, is the simpler part of the administrative function, so that the difficult and now more voluminous sector of the subject—that is, the making of rules and regulations—is at least obscured.

The first of these characteristics enervates the chapter on "methods of access to the courts," and the second affects the consequently abbreviated chapter on "policy." In developing its description of "methods of formal [adjudication] procedure", the volume begins in clear and simple terms. Its critical discussion is valuable. It admonishes—and it often assumes—great regularity and fairness in administrative adjudication. There are occasional flashes of pointed candor: Administrative powers "carry with them great and dangerous opportunities of oppression and wrong" so that "if we are to continue a government of limited powers these agencies of regulation must themselves be regulated" (p. 2). An administrative agency has the advantage in dealing informally with a private party, because the latter "will not want to be in the bad graces of the agency which administers a law affecting his business" (p. 12). The subpoena power "is one which is obviously open to the possibility of abuse" (p. 25). Actual policy of agencies "may often be unexpressed", so that the public is left in the dark (p. 56). Because of the devious or unpublished nature of many administrative procedures, "the final decision rests with a judge to whom there is no opportunity of direct approach by the litigants" (p. 217). In the presently important fields of grants of money or awards of contracts "the courts have so far done least for the protection of individuals" in connection with administrative process and procedures (p. 228).

Contradictions

But in the course of its two hundred odd pages the book progresses from stern, to analytical, to lenient and something more than conciliatory. In addition, the discussion is not without serious contradictions, due perhaps to several hands in the writing and the attempt to treat a great many subjects in few pages. Why "must" the "memoranda of the technical assistants . . . be . . . produced at the hearing" (p. 49), when so often and so obviously they are not? Particularly when later the authors themselves state that judicial notice, extra-record consultations with agency experts, and the necessity of findings "are questions to which no full answers have been found" (p. 201)? If "the person who decides must hear . . . the evidence" (p. 200), how is it that "the hearing must usually be held before a subordinate officer" (p. 220)? What are rules and regulations which "do not have the force and effect of law" (p. 65)? If for purposes of judicial review the courts "are amply equipped" (p. 193), how is it that "the courts have only a limited reach and control" (pp. 227-228), or as to policies "little control" (p. 73)?

It is said that "Congress tends more and more . . . to give attention to questions of how far the agency may go . . . and to what extent its action may be reviewed by the courts" (p. 226)—but in fact, as pointed out even by the Attorney General's Committee on Administrative Procedure, the statutory language of review has hardly changed in thirty years and even verbal differences in statutes produce no determinable variations in the scope of judicial review (Final Report,

Senate Document No. 8, 77th Cong., 1st Sess., p. 89). The book states that courts on review "take the whole record into account" and thereby "appear to involve a wider range of review than the statutes intend" (p. 226) —but in fact courts often "look only to the evidence that is favorable to the Board" or other administrative agency (*Rapid Roller Co.* v. *National Labor Relations Board*, 126 F. 2d 452, *cert. denied* 317 U. S. 650), whereas Congress must have intended that they should review the whole record, since the review of only part of the record or of that part supporting the government excludes even uncontradicted and indubitable evidence to the contrary and thus nullifies the right to a hearing. However, in at least partial contradiction of the foregoing quotations the authors state—and, as a prediction, their statements have since become operative —that "the responsibility of Congress . . . is increased by the tendency of the courts to withdraw from interference" with administrative agencies (pp. 228-229); that "Congress . . . has a wide field in which it . . . must assume full responsibility for a careful consideration of the situation . . . and for the reconsideration of . . . procedures of the agencies already in existence" (p. 229); and that, "as the check of the courts on the substantive provisions of statutes diminishes, the importance of the work of congressional committees becomes more apparent" (p. 73).

Administrative Theory

In contrast to their prior measured discussion of the administrative process, in their conclusions the authors become enthusiastic. "The making of policy" is said to be the prime object "of administrative agencies as instruments of government" (p. 208). This they are said to do through "expert assistants . . . trained in their subjects and by long experience" and aided by "a great mass of information" (p. 208). But even this internal omniscience is not enough, they say, for, "the heads of the agency should not depend wholly upon their own judgment in the process of policy forming" but "should check the findings of its experts and its own judgment with the experience and opinions of the persons in the business or social activity under regulation," which may be done through "private conferences" (p. 209). As to the "combination of function of prosecutor and judge," (1) it is said to have limited or little application to claims cases or those involving permits, licenses, or rate-making, (2) few cases ever reach formal procedure anyway, and "in arranging informal settlements . . . the agency can apply its policy with the least interference," (3) the internal separation of prosecutors from judges "meets the objection to some extent," (4) "the procedure leading to the making of an order cannot be easily divided between the functions of a prosecutor and a judge," and hence separation of functions "is not practical," and (5) although appeal boards may be an answer to the problem in some agencies, "no single solution can be found to meet the very real problem of prosecutor and judge" (pp. 209-216). An administrative agency is "less hampered in its study of the facts by rules of evidence than would be a court" (p. 223). It "should not be required to write opinions in all cases" (p. 61). Administrative agencies have "immense power" through the penalties they may impose or privileges they may withhold, which is "a valuable aid to the purposes of regulation" and the "increasing need for directive control" (p. 223). These "economic penalties" and this "cluster of controls" are greater than any imposed or exercised by courts (p. 224). Moreover, by the mere threat of administrative prosecution and publicity an agency "may effectuate its purposes in full" (p. 224). Apparently these powers need not cause alarm because their placement in administrative agencies removes "from the area of politics the difficult task of finding solutions for . . . conflicting interests" (p. 234).

The authors' administrative point of view is hung upon a current theory as to the nature of administrative justice, which theory amounts to an assertion that administrative justice is not to be adapted to people but that the activities of people shall be shaped to fit it. It is the philosophy of a planned society resting upon an assumed public ownership of all rights to be dispensed only as privileges by administrative agencies. "The individualized resolution of controversy no longer suffices," say the authors (p. 223) —a statement which, for example, is illustrated in practice by a recent opinion of a War Labor Board Panel wherein it is stated that "the question must be decided on a basis or consideration which goes beyond the facts and the records" and "must be determined on general consideration and principle," although the dissenting member felt that the issues "should be decided upon the merits as the record shows them and not upon the presentations of the Panel." (*Chrysler* v. *U.A.W.*, Case No. 960, May 29, 1943). "Private rights cannot be [the] primary concern in the same sense that they are traditionally the primary concern of the courts" (p. 55). "Where a court is traditionally limited by the confines of the controversey presented to it, the administrative sanction is determined with a view to the whole background" (pp. 223-224). "The reasonable protection of the rights of individuals must be reconciled with the public purposes for which the agency is constituted" (p. 234). (To the same effect see the recent dissent in *Federal Communications Commission* v. *National Broadcasting Company*, decided May 17, 1943, — U. S. —, wherein it is stated: "Unlike courts, which are concerned primarily with the enforcement of private rights although public interests may thereby be implicated, administrative agencies are predominantly concerned with enforcing public rights although private interests may thereby be affected.") But the authors also have a contrary view: "No matter where the application of law to facts is being performed, whether in courts or administrative agencies, policy is being shaped and applied" (p. 216); "to the extent that administra-

tive agencies employ judicial procedure in the imposition of penalties, they tend to become courts with other names" (p. 224); and "the agency in deciding a case is doing practically the same thing that the courts ordinarily do" (p. 216). Since their book was written, the Board of Tax Appeals has become a court without changing anything more than its letterhead. That courts are just as concerned with broad public policy or rights in non-administrative cases as are other instrumentalities of justice is self-evident in recent decisions regarding religious liberty, the validity of Reno divorces, the duty to salute the flag, the law of treason, the scope of the anti-trust laws, the jurisdiction of military tribunals, the effect of the Norris-LaGuardia Act, and others at least as numerous as administrative decisions.

Sanctions

Departing from the Attorney General's Committee materials, the authors have produced a splendid descriptive chapter on administrative sanctions—that is, the administrative imposition of penalties or grant of remedies, privileges, or money. Among these are noted many which have been recently developed administratively and are almost uncontrolled—such as economic competition, publicity or public censure, the promulgation of non-compulsory standards, or the grant of non-exclusionary licenses or approvals (p. 81). Of these, for example, "the sanction of publicity is generally unrestricted by formal procedural safeguards, although its effect in damaging or destroying an enterprise is in many cases equivalent to the effect of suspension or even revocation of a license" (pp. 111 *et seq.*). Investigations and direct supervision have been developed upon a statutory base, and "the trend is from policing to supervision" (p. 85). Almost any official act which casts doubt on commodities, or securities, or businesses is a powerful blow for which no remedy exists even if ill-advised or unwarranted (pp. 85 *et seq.*), save "internal and subjective restraints" or congressional investigations (p. 89). The grant of money, subsidies, loans, or privileges is an increasingly dominant form of governmental control; and it is even more true than when the book was written that "the principal development in the use of governmental benefits and privileges as sanctions has taken place in the field of government contracts" (p. 107). Administrative agencies "report" to the Attorney General—and, it may be added, insist upon prosecution of—allegedly criminal acts or occasions for the imposition of civil or money penalties (p. 109 *et seq.*). In their analysis and description of the broad sweep of more formal administrative sanctions—such as the administrative imposition or remission of money penalties, the denial (or suspension, revocation, or annulment) of licenses (or certificates, permits, charters, memberships, or registrations), the issuance of cease and desist orders (or administrative injunctions), the condemnation and destruction of goods or property, and the assessment of damages (or "reparations," including back pay)—the authors have made a real contribution to a subject which subsequent years have seen and will increasingly see emphasized and made a matter of first importance, although as yet hardly touched in the thought and literature of administrative law.

CARL MCFARLAND

Washington, D. C.

Economic Union and Durable Peace, by Otto Tod Mallery. 1943. New York: Harper. Pp. 183, XVI.—In each recent number of the AMERICAN BAR ASSOCIATION JOURNAL there has appeared an article, address or report on post-war problems and plans. Mr. Charles M. Lyman in the July 1943 number strikes the keynote: "Never has the American Bar Association had a greater opportunity combined with a heavier responsibility than it now faces with respect to post-war planning." Obviously the columns of the JOURNAL, although they are wide enough to give space to minority viewpoints, are not long enough to keep the members advised of every worthwhile volume coming from the press dealing with the problems which face the United States in grappling with the "Post-War World Order," to use the phrase of Mr. Justice Roberts, found in the June 1943 issue.

In the belief that a book review is a suitable means of inviting attention to a thin but thoughtful volume on implementing the fourth point of the Atlantic Charter, which shows the relationship between a "better future for the world" and the development of "access on equal terms to the trade and raw materials of the world," this review has been written for the consideration of members of the American Bar Association.

The author, Otto Tod Mallery, while not a lawyer, has spent many years studying the problems of government. It is his opinion that durable peace will come from general acceptance of an economic system designed to raise the standards of living throughout the world which, in turn, will permit the lowering of trade barriers and the extension of the Hull reciprocal trade agreement program. Space is found to present in brief compass analyses of other typical plans for preserving peace in the post-war world. The author is able to speak clearly for himself, and the final paragraph of this review may perhaps be granted to the reviewer, who is interested in one of the "130 private organizations . . . engaged in . . . planning for the post-war period," mentioned in the May 1943 number of the JOURNAL (page 245). The Temple University Institute for post-war planning has not yet formulated any specific suggestions, and the following paragraph reveals merely one person's comment:

"The concept presented by Mr. Mallery seems sound, but the title of his book is misleading. Clarence Streit used advisedly the title *Union Now*, meaning political union, and Mr. Mallery apparently desires to substitute economic union of like-minded nations in place of political union of kindred nations. A more accurate

title would be *Economic International Agreements as Steps Toward Durable Peace.* Of course such a title is unwieldy. Perhaps, in the second edition, the publisher and author may find a new title such as *Economic Keys to Durable Peace."*

ALBERT SMITH FAUGHT

Philadelphia

Occupational Tumors and Allied Diseases, by W. C. Hueper. 1942. Springfield, Ill.: Charles C. Thomas. Pp. 896, inclusive of Index.—This book furnishes an extensive source of information concerning the various aspects and the different types of occupational tumors and allied diseases. It includes essentially a review of existing medical literature dealing with tumors, such as cancers, arising in industry, which literature the author attempts to analyze critically. He integrates the evidence obtained from different sources, correlates and evaluates the various observations made and theoretical conceptions advanced in an effort to form a well balanced and coherent picture of the subject under discussion.

The concluding chapter deals with the medico-legal and public health aspects of occupational and accidental traumatic tumors. In connection with the latter, the author points out that the relation of an occupational trauma to a cancerous condition may assume one of five forms: (1) an occupational injury may be incriminated as the direct or indirect cause of a malignant growth arising in a tissue which was apparently normal prior to the accident; (2) an accidental injury may be superimposed upon tissue affected by some kind of non-cancerous condition of occupational or non-occupational origin and may bring about a malignant transformation of the cells in the traumatized area; (3) an accidental trauma may involve a preexisting cancer, hastening its course; (4) an external trauma, while not involving a preexisting cancer directly, may lower the general vitality and resistance of the affected individual to such an extent that the impairment of the general health interferes with the timely application of therapeutic procedures necessitated by the cancerous condition, or aggravates appreciably the dangers connected with such procedures, reducing the normal prospects of cure or life expectancy; and (5) the pathological conditions created at the site of an accidental injury may favor the colonization of tumor cells originating from a cancer remotely located from the traumatized area.

The chief medical controversy, the author points out, centers around the question whether or not a single trauma may elicit in a previously normal tissue, within a few weeks, a malignant neoplastic reaction. This controversy is, of course, of important medico-legal significance in connection with workmen's compensation cases. The book contains extensive bibliographies and constitutes a useful compilation of information, filling a need not previously met.

J. W. HOLLOWAY, JR.

Chicago

Backbone of the Herring, by Curtis Bok. 1941. New York: Alfred A. Knopf, Inc. Pp. 302.—This is a distinctly unique book about law and justice as understood and applied by a judge named Ulen in a Philadelphia Court of Common Pleas. Ulen is the mouthpiece of an actual judge, who happens to be the son of the late Edward Bok, and who is as fair and kindly as his father was. He has written a personal and thoroughly human document. He is not sentimental, but he has charity and sympathy—"the greatest of these." Lawyers and laymen interested in true justice and in people will find the book dramatic and absorbing.

The book is in part autobiography, in part borrowed experience, in part fiction. Judge Bok is something of a poet, a good deal of a philosopher, and not a little of a psychologist—a rare combination for the bench. He is never sure just what justice is in the abstract, and he is not disposed to bow down to mere precedent. He has seen too much of life and its tragedies and tragicomedies to worship sacred cows. He knows that legal justice is often moral and social injustice, but judges are bound to apply statutes with one eye on the "Olympian" appellate tribunals. He rightly fears that Justice Holmes would have been unhappy as a trial judge. He trusts the still small voice of conscience, but not all such voices are inspired.

The sketches in the book record many actual cases—murder, divorce, adoption, wills, vice, etc. The sit-down strike case is doubtless symbolic and imaginary. It illustrates how not to settle such affairs as well as how to deal with them sensibly.

Why cannot we have more judges of the type of Ulen—or Curtis Bok? You cannot have justice without an emotional urge to do justice in individual cases, justice tempered with mercy: without imagination and love of goodness and beauty.

VICTOR S. YARROS

La Jolla, Calif.

The Logical and Legal Bases of the Conflict of Laws, by Walter Wheeler Cook. Harvard Studies in the Conflict of Laws, vol. 5. 1942. Cambridge, Mass. Harvard University Press. Pp. XX, 473. *Principles of Private International Law,* by Arthur Nussbaum. 1943. New York: Oxford University Press. Pp. XVI, 288.

These two books, published almost simultaneously, must be counted among the most important contributions to American Conflict of Laws since Beale's Treatise appeared in 1935. Mr. Beale has been fittingly characterized as "the rediscoverer, systematizer, and evangelist of the Conflict of Laws."[1] Professor Cook may well be called the outstanding iconoclast in this field. Professor Nussbaum brings to the discussion his vast experience in the civil law; he demonstrates the cosmopolitan aspects of the basic problems which confront lawyers whenever foreign elements enter into a legal situation, and the usefulness of comparative studies. The two authors under review have a good deal in common. From their "functional" viewpoint,

they criticize Beale's theory of territoriality along very similar lines, and on many points they strengthen and supplement each other's arguments.

A 'Study in Legal Method': Principles v. Experience

Cook's book is designed as "a study in 'legal method,' i.e., an analysis of some of the more common problems which present themselves in this field with special reference to the intellectual tools available for their solution" (p. IX). His attack is directed against the method of deductive reasoning which, by a process of logical syllogism, derives solutions from "concepts" and "principles" which are deemed to be preexisting (axiomatic) while in reality they are nothing but shorthand symbols summarizing the result of previous experience. The concept of "jurisdiction" as utilized by Beale and the Restatement is an excellent illustration (p. 71 et seq.); the formula of "foreign-created rights" (p. 32 et seq.) is another case in point. Cook shows that the actual process in deciding a "new" case "involves a comparison of the data of the new situation with the facts of a large number of prior situations which have been subsumed under a 'rule' or 'principle' within the terms of which it is thought the new situation may be brought. This comparison, if carried on intelligently, necessarily involves a consideration of the policy involved in the prior decisions and of the effects which those decisions have produced" (p. 43). True, courts often reach socially satisfactory results by unconsciously or unavowedly applying this method while professing to obtain them by formal-logical deduction. But the assumption of mechanically applicable rules may (and often does) lead judges to neglect that search for the policy underlying previously established rules, and thus to arrive at unsatisfactory decisions. Any one familiar with European theories of legal method will immediately identify Cook's thinking with that of the school known by the awkward name of the "jurisprudence of interests," which has so successfully battled against the "jurisprudence of concepts." Precisely like the protagonists of that school, Cook has been accused of advocating the discarding of all rules and principles. His book, I believe, shows such criticism as unfounded. What he does is to assign a proper place to generalizations, regarding them as tools rather than masters, tools which must be used with discrimination. From this viewpoint, which he explains in the first three chapters, the author scrutinizes the notion of "domicil" (Chapter VII), the basic problems of "*renvoi*" (Chapter IX) and "characterization" (Chapter VIII, and cf. his analysis of the categories "substance and procedure," "immovables and movables," "tangibles and intangibles" in Chapters X, XI, and XII), and the generalizations found in the conflict rules concerning contracts (Chapters XIV to XVI), torts (Chapter XIII), capacity to marry (Chapter XVII), and jurisdiction to divorce (Chapter XVIII).

The result is not only a clarification of the thought processes involved but also a refinement of existing rules which is greatly needed in Conflict of Laws. Thus, e.g., Cook suggests that "contracts" be broken down into different groups or types according to the social, economic and business interests regulated, and that the most appropriate rule be formulated for each such group (pp. 417-418; he would have found a good example of rules diversified along these lines in the Polish statute of 1926.)[2] He further suggests that the domicil of a party to a contract may well have a predominant social interest in determining his capacity, as, e.g., in the case of a married woman acting in the state where she is living, or in cases like *Union Trust Co.* v. *Grosman* (p. 434 et seq.). Or take tort liability in cases where the relevant facts occurred in two or more jurisdictions. Rigid adherence to the rule of *lex loci delicti* has led the courts to choose one of them as *the* "place of wrong" by applying a "last event" theory similar to the artificial "last act" rule used to determine the "place of contracting." It might be more sensible, as the author suggests, "to adopt whichever of the two (or more) domestic rules is most favorable to the plaintiff" (p. 345). Furthermore, should every question connected with a tort be decided by the law of the place of wrong? When, e.g., a wife's capacity to sue her husband in tort is disputed, it would seem more appropriate to consult the law of their domicil on this question, since that law has a predominant interest in regulating husband-wife relations (p. 346).

Choosing the Rule: Social and Economic Needs

These are some simple illustrations showing the refined analysis for which Cook pleads, and the greater adaptibility of conflict-of-laws rules to social and economic needs which results from his method. Space does not permit a detailed discussion of all the subjects which he covers in the book. The reader will find every chapter stimulating and challenging. The fact that many of them have previously appeared as law review articles and have remained practically unchanged (except for some "supplementary remarks") does not make for easy reading. It is therefore to be regretted that the author decided to omit the final chapter which he had written to summarize his viewpoint and his conclusions, and which he has since published elsewhere.[3] This brief summary is highly to be recommended. It contains a concise answer to the often-heard criticism that Cook's method would give us chaos instead of certainty. Another objection, to the effect that his work is merely destructive and that he

1. Griswold, "Mr. Beale and the Conflict of Laws" (1943) 56 Harv. L. Rev. 690, 693.

2. Reproduced in Cheatham-Dowling-Goodrich-Griswold, "Cases and Materials on Conflict of Laws" (2d ed. 1941), p. 481 et seq.

does not offer any constructive proposals, is anticipated by him in the Preface, where he declares that the main object of the volume is to free the intellectual garden of the rank weeds which prevent the growing of useful vegetables. At the same time, however, he does put forward a considerable number of specific solutions to concrete problems, as I have indicated in the foregoing and as the reader will find out for himself. The chapters dealing with the powers of Congress under the full faith and credit clause and the role of the federal courts (IV and V) are outstanding in this respect.

Civil Law Point of View: 'Vested Rights' and 'Local Law'

Nussbaum's views on many questions coincide with those of Cook. Thus in the matter of contracts, both direct the same criticisms to the "place of contracting" theory and advocate a "proper law of the contract" rule combined with an application, within reasonable limits, of the law intended by the parties (cf. Nussbaum, secs. 16 to 18). Rather than point out similarities, however, the review should elaborate the distinguishing features of both books. In the first place, Nussbaum's volume is a systematic treatise, and hence has the advantages of better organization and greater coherency over Cook's collection of articles. Also it covers more ground on fewer pages, and therefore the argumentation is briefer and less detailed than Cook's. Nussbaum has an excellent chapter on public policy (sec. 12); he discusses the question of "evasion" (sec. 13) and deals at some length with procedural questions, among them the taking of evidence abroad (sec. 22) and proof of foreign law (sec. 24.) In the second place, Nussbaum's approach is that of the comparative lawyer. The author had established a high reputation for himself in continental Europe before he made his home in this country. He has since become thoroughly familiar with American Conflict of Laws and the aspects peculiar to our federal system (cf. sec. 7 and 12, IV). What this meant to him he summarizes in these words to which every civil lawyer who has studied the common law with an open mind will subscribe: "This experience meant more to me than an increment in knowledge. The new atmosphere gave rise to fresh shoots of thought. Many views, previously formed, were reexamined and, I hope, corrected, deepened, and adapted to wider horizons" (p. X–XI.) I believe that this book, in turn, will open new vistas to American students of Conflict of Laws and induce them to reexamine rules and principles hitherto accepted unquestioningly. The brief historical chapter (sec. 2), together with the remarks on "modern literature of private international law" (sec. 6), where Nussbaum emphasizes the "migration of legal thought," and the bibliographical guide (p. 267 et seq.) will be found very helpful. The author surveys the various doctrines which have been put forward to explain and rationalize the application of foreign law but has not much use for any of them, whether it is the "law-of-nations" doctrine, or the "vested-rights" theory, or the "local-law" theory (Cook). "In order to justify the use of foreign law, it is entirely sufficient to understand that in many cases full justice cannot be attained except by considering the foreign law which 'colors' the litigated facts. Hence the ultimate explanation for the resort to foreign law should be sought in the ends of a sound administration of the law, or in the ends of justice, according to whether one prefers the juridical or the philosophic formula. . . . One should not try to conceive of a phenomenon so complex as Private International Law in terms of a single principle" (p. 35).

One may agree with this statement as long as the discussion turns on the *raison d'être* of conflict-of-laws rules in general. But when a judge is confronted with a new case, the criterion of "sound justice" is not enough to help him make a sound decision, just as previously formulated generalization (rules) are not enough. In addition, the judge must have some idea about what he is doing when he "applies" foreign "law." The matter then becomes, in Cook's words, "more than one of competing abstract theories." "Varying theories may ultimately lead to varying solutions of practical problems, especially where the policy of a decision one way or another is not clear in the minds of the judge or judges who have to decide" (Cook, p. 340). And it seems to me that the "local law" theory as developed by Cook is apt to guide judges more safely than the notion of enforcing "foreign-created rights."

'Homeward Trend' in Conflict of Laws

Nussbaum draws attention to a feature observed in courts all over the world, which he calls "the homeward trend" in Conflict of Laws, i.e., a tendency to arrive, if possible, at the application of domestic law (p. 37 et seq.). This natural preference for the familiar is the main reason which has commended the *"renvoi"* doctrine to continental courts whenever the *renvoi* enabled then to apply their own domestic law (cf. p. 94, 99). Mere preference for the *lex fori* is, however, not sufficient to explain the role of public policy in conflicts cases. "Conflict use of public policy . . . means that in the case of strongly conflicting policies a court must follow the local policy rather than the policy of a foreign state" (p. 118). In asserting their own local policies, French courts, as the author remarks, have overstepped the mark. On the other side, American and English courts are rather too timid. "Under the stress of this sentiment, the courts have resorted to hair-splitting—and sometimes to astounding—interpretations of undesirable rules in order to escape the reference to public policy even though such a reference would have

3. 37 Ill. L. Rev. 418 (1943) and 21 Can. Bar Rev. 249 (1943).

been perfectly justified under the circumstances" (p. 113–114). Nussbaum traces this attitude back to the liberal tradition, based upon the political conditions of the Victorian era. "Liberalism postulates international-mindedness favorable to the recognition of foreign law"; but—and this is a timely warning which does not apply to Conflict of Laws alone—the materialization of liberal doctrines "presupposes the presence, on the opposite side, of a similar spirit, lest liberalism result in sheer profit for the illiberal, and in scorn to the generous" (p. 115). The author does not neglect the "American facets of the public-policy doctrine" (p. 120 et seq.), which strongly reflect interstate relations as distinguished from international relations. Other than most American writers, Nussbaum upholds the necessity of protecting state law by means of the public-policy rule, which he regards as a guarantee for territorially limited experimentation within a federal system (p. 124). In doing so it seems to me he overlooks the danger that "local fancies" (to use a term coined by Goodrich) in the cloak of "public policy" may defeat the ends of interstate conflicts rules—a tendency which has been greatly encouraged by the decisions of the Supreme Court in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487 (1941), and *Griffin* v. *McCoach*, 313 U. S. 498 (1941).

MAGDALENE SCHOCH

Harvard Law School

RECENT PUBLICATIONS

A HANDBOOK OF PSYCHIATRY, by P. M. Lichtenstein, M. D., and S. M. Small, M. D. 1943. New York: W. W. Norton & Company, Inc. Pp. 330. Price $3.50.

THE BOOK OF THE STATES 1943-44. 1943. Chicago: The Council of State Governments. Pp. xii, 508. Price $4.

REISSUED NOTES ON BILLS AND NOTES: A Collection of Studies during Twenty-five Years on Difficult Problems in the Law of Negotiable Instruments, by Zechariah Chaffee, Jr. 1943. Cambridge, Mass.: Z. Chaffee, Jr. Price $3.

Improving the Administration of Justice

(Continued from page 501)

gime. They should be leaders no less in maintaining the characteristic American legal constitutional polity under which America has been a land to which people have been glad to come from every part of the world and find a haven where they could live the lives of free men—could freely develop their powers to the highest unfolding. To maintain this polity in a time of revived absolutism and general reliance on force rather than reason, the legal order which it presupposes must be made to function as efficiently as possible toward the ends of justice. If our legal institutions do not do what is demanded of them, the people will turn to other means of securing individual and public and social interests.

Our American mode of life has postulated the legal constitutional polity which we developed from the struggles of the courts with the Crown in seventeenth-century England and of Americans with the Crown and the Council at Westminster in the eighteenth century. We shall not maintain it by reverting to the methods and ideas of the age of absolute government. Thus improvement of the administration of justice is something of much more than professional concern. It is a matter of concern to every one who believes in America, in American institutions, and in American life. But the lawyer is primarily responsible for bringing our administration of justice according to law to the highest pitch of development. He is best qualified to the task, and is impelled to it both as a professional and as a civic duty. Certainly the lawyers of today are no less equipped for the task than were those of our formative era.

Dean Roscoe Pound's Notable Presentation

(Continued from page 502)

further efforts by its lawyers and judges. During the present Association year, that Section has brought together a notable presentation as to state administrative law and procedure. This will soon be available to the profession and the public, as well as the results of a comprehensive survey conducted by Chief Justice Simmons of the Nebraska Supreme Court.

To an increasing extent, many of the states are coming to realize their responsibility, under the American federal system, for working out many of their own problems in their own way, in the light of the experience gained in other jurisdictions. Many of the states, including some of the smaller ones, recognized from their beginnings, in their own organic law, the ideals of liberty and justice for which their institutions should be kept functioning. The Constitution of Wyoming, as first adopted in 1889, provided, in a vigorous "Declaration of Rights," as it still does (Article I, Section 7), that

> Absolute, arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

The Constitution of Kentucky, as adopted September 28, 1891, declares the same vital principle in the same wording. Continuing improvement in the state administration of justice is implicit in the guaranties vouchafed by the state constitutions without exception. Dean Pound has again sounded a keynote for practical efforts to accomplish this great objective.

JUNIOR BAR NOTES

By HUBERT D. HENRY
Secretary, Junior Bar Conference

"THE Young Man in the Post-War World" was the subject of the principal address delivered by Gardner Cowles, Jr., of Des Moines, Iowa, at the Tenth Annual Meeting of the Junior Bar Conference held on Sunday afternoon, August 22, at the Drake Hotel, Chicago, Illinois. Mr. Cowles accompanied Wendell Willkie on his flight around the world, which served as a background for the recent publication, *One World*. He is a well-known newspaperman and is publisher of the Des Moines *Register and Tribune*. Drawing upon his wide experience in this field, he presented an interesting viewpoint on the most popular subject of the day. His observations will long be remembered by those who attended the meeting.

The first general session was called to order by James P. Economos, vice-chairman, who acted as the presiding officer. The invocation was delivered by Rev. J. Bradford Pengelly of St. James Church, Chicago. Samuel W. Witwer, Jr., newly-elected chairman of the Younger Members Committee of the Chicago Bar Association, tendered the official welcome on behalf of the host associations.

National Chairman Joseph D. Calhoun briefly summarized the year's activity and made suggestions calculated to benefit the Conference. He called attention to the fact that, despite dire predictions to the contrary, the Junior Bar Conference had increased its effectiveness in this war era. The relatively small turnover of personnel was indicative of an increased sense of responsibility. He predicted that the cohesion achieved in wartime would remain throughout the post-war period.

The recommendations contained in the committee reports served as the foundation stones of the 1943-44 activities. The complete program will appear in a later issue.

The Annual Meeting of the state chairmen and delegates from junior bar groups affiliated with the Junior Bar Conference was held at the Medinah Club on Monday, August 23. This was a luncheon meeting followed immediately by a business session devoted to war readjustment problems of young lawyers, traffic court administration and legal assistance to the armed forces. Hubert D. Henry acted as presiding officer and introduced Lyman Tondel, Jr., New York City, Watson Clay, Louisville and Park Street, San Antonio, all chairmen of the committees studying these subjects.

The second general session was held the next day in Hoyne Hall, Northwestern University Law School. A special program devoted to improving the administration of justice by Traffic Courts was presented. The following persons participated: Hon. Clifford E. Enger, judge of the Municipal Court, Austin, Minnesota, and president of the Minnesota Municipal Judges Association; Hon. Gibson E. Gorman, judge of the Municipal Court of the City of Chicago; Hon. Harry W. Porter, judge of the Municipal Court of the City of Evanston, Illinois; Senator Walker Butler, the Illinois State Senate; William A. Barth, assistant corporation counsel of Chicago assigned to the Traffic Courts; Sidney J. Williams, general manager of the National Safety Council, and Watson Clay, chairman of the Traffic Court Committee. This proved to be a worth-while session with an excellent interchange of ideas relating to post-war problems of Traffic Courts.

The entertainment provided by the local committee was continuous throughout the meeting. It began with a luncheon on Sunday afternoon, at which a short address of welcome was delivered by Hon. Floyd E. Thompson, president of the Chicago Bar Association and a former justice of the Illinois Supreme Court. That evening an informal reception was tendered to the visitors by the younger members of the Chicago Bar Association. Tuesday the annual dinner dance was held in the Furniture Club.

The new officers of the Junior Association of the Milwaukee Bar are: president—Ralph von Briesen; vice president—Richard M. Rice; secretary—Robert W. Haight; treasurer—Henry C. Quarles, and executive board members—John J. Burke, Eldred Dede, George Frederick, Jack N. Eisendrath, and Webster Woodmansee.

The new Chairman of the Junior Bar Section of the Detroit Bar Association is James D. Dingeman. William J. Oldani was reappointed secretary.

New officers of the Kansas Junior Bar Conference elected at the annual meeting are: chairman—Frank G. Theis, Arkansas City; vice chairman—Richard Kirkpatrick, Wichita, and secretary-treasurer—Mrs. Dorothy Tyner, Topeka.

New officers of the Junior Bar Section of the Louisiana State Bar Association are: chairman—Arthur C. Watson, Natchitoches; vice chairman—P. A. Bienveno, New Orleans; secretary-treasurer—H. Alva Brumfield, Baton Rouge, and Councilmen—James A. Bugea, New Orleans; Haywood H. Hillyer, Jr., New Orleans; Lawrence P. Simon, New Iberia; Edward S. Robertson, Shreveport; Cameron Minard, Columbia; James R. Major, Baton Rouge; Frank M. Brame, Lake Charles, and Vincent Hazelton, Alexandria.

The new officers of the Junior Bar Section of the Pennsylvania Bar Association are: president—Paul Kern Hirsch, Pittsburgh; vice president—Harold R. Prowell, Harrisburg; secretary—George W. McKee, Harrisburg, and council members—Joseph P. Strauss, Philadelphia; David Gernerd, Allentown; Carl Rice, Sunbury; John H. Davidson, Washington, and John H. Jordan, Bedford.

WAR NOTES

By TAPPAN GREGORY

Of the Chicago Bar

THE following resolution was adopted by the Executive Committee of the Chicago Bar Association Committee on War Activities, Aug. 9, 1943:

It is now apparent that a large percentage of legal matters disturbing men in the Armed Forces relates to domestic relations and particularly to divorces. Calls for assistance in the solution of such problems have reached proportions persuasive of the wisdom of a change of policy. If we are to achieve our objective of relieving the minds of those in the Armed Forces of anxiety over legal problems to the extent contemplated, we must be prepared to undertake the representation of these men in divorce cases. Some can afford to pay fees for such service, but probably the majority, and perhaps the overwhelming majority, cannot.

The organized bar has taken pride in the amount of gratuitous service rendered servicemen and their dependents and the Army and Navy have come to place great reliance on the availability of the members of the bar for this service without charge. We can well afford to ignore the comparatively few cases where the bar may be imposed upon by those well able to pay, in the interest of making the maximum effort to insure skillful attention to those in sore need.

IT IS THEREFORE RESOLVED by the Committee on War Activities of the Chicago Bar Association that hereafter representation to servicemen in divorce matters will be furnished without compensation by the volunteer panel of lawyers organized by the Chicago Bar Association for military legal service, whenever the case of the serviceman appears meritorious and as long as the experience of the Committee indicates that this gratuitous service is feasible and practicable. In determining the validity of any claim by any serviceman seeking to avail himself of gratuitous representation by the bar in the matter of a divorce, whether he be plaintiff or defendant, it will be the policy of the Chicago Bar Association Committee to maintain a special committee always available for prompt decision on the question of rendering service with or without charge in such cases as appear to the office personnel to be outside the scope of the Committee's service. It will be quite apparent that effective service cannot be rendered where the member of the military or naval forces is in camp outside the State of Illinois and not available for consultation, unless his case is carefully briefed, his witnesses listed and interviewed and provision made for the payment of costs by the serviceman or some one in his behalf other than the volunteer lawyer assigned.

The success of our plan will depend upon the cooperation we may secure from Legal Assistance Officers at the servicemen's stations, from the Red Cross, from the organized Legal Aid and from the Provost Marshal General's office.

The daily press carries word of an opinion by Attorney General George F. Barrett of Illinois holding that proxy marriages in Illinois are prevented by "statutory provisions requiring presence of both parties for the issuance of the marriage license."

In the Municipal Court of the City of New York, Borough of Brooklyn, Fourth District, appears an opinion holding that where a defendant is in military service but is represented by counsel in the litigation and no proper legal defense is interposed for him, a motion for stay in his behalf will be denied.

The United States District Court for the Northern District of West Virginia holds that the opinions of the Director of Selective Service do not have the force of law.

The fact that property sought to be requisitioned by the government as necessary for the war effort was held by a trustee in bankruptcy for the benefit of the creditors of a corporation in process of reorganization does not impair or delay the power of the President to requisition such property. This is the holding of the United States District Court for the District of Minnesota, Fifth Division.

The Supreme Court of Arkansas holds that the burden is on the party resisting a stay of proceedings of satisfying the trial court by clear and convincing evidence that the rights of the soldier or sailor involved will not be impaired while he is in military service by denying the stay. This case, of course, involved a construction of the Soldiers' and Sailors' Civil Relief Act.

In the Supreme Court of South Carolina it has been held that the courts cannot take judicial notice of the existence of a war by their government until there has been a declaration of war by Congress and therefore that the death of an insured seaman in the United States Navy in the attack at Pearl Harbor on December 7 did not occur in time of war within the meaning of the provisions in the policy on his life limiting the insurer's liability.

In a case decided by the City Court of New York, Queens County, three partners were lessees of a gasoline filling station. They deposited money with the lessor for security for the performance of the lease. One of them entered military service. The lease was terminated and the court held that the one entering service was entitled to the return of his share of the money deposited but that his two partners could not obtain relief.

Benjamin Harrison

(Continued from page 515)

its, who are prone to ponder the pros and cons of argument before reaching a decision. His manner was austere and impersonal, and, though not at heart unfriendly, that manner left individuals cold. He possessed, however, a rare faculty of inspiring audiences. A story went the rounds that, during a campaign in which his speeches aroused great enthusiasm, on concluding a rear platform talk, a member of his entourage pulled the bell rope and started the train. When reproved he exclaimed, "Don't talk to me. I know my business. Ben Harrison had the crowd red-hot. I didn't want him to freeze it out of them with handshaking."

He was a man of deep religious convictions. Addressing the Ecumenical Missionary Conference in Carnegie Hall, New York, the year before his death, he gave voice to his faith in words of singular beauty. "The highest conception that has ever entered the mind of man," he said, "is that of God as the Father of all men—the one blood—the universal brotherhood. It was not evolved, but revealed. The natural man lives to be ministered unto—he lays his imposts upon others. He buys slaves that they may fan his sleep, bring him the jewelled cup, dance before him, and die in the arena for his sport. Into such a world there came a King 'not to be ministered unto but to minister.' The rough winds fanned His sleep. He drank of the mountain brook, and made not the water wine for Himself; would not use this power to stay His own hunger, and had compassion on the multitude. He called them. He had bought with a great price no more servants but friends. He entered the bloody arena alone, and dying, broke all chains and brought immortality to light."

On March 13, 1901, at Indianapolis, the final curtain fell on the life of him who had fought the good fight and kept the faith in war and peace.

Letters to the Editors

To the Editors:

MAY one venture to call attention to one important point in Dean Wigmore's letter published in your issue of March, 1943? As he indicates correctly, the ancient and still existent Hindu custom of "sitting dharna" is based strictly upon the sanctity of the life of the Brahmin. Therefore, it is a form of redress which can be had only by a member of the Brahmin caste. Also, it can be applied only against a debtor who is a Hindu, or in a community which is so overwhelmingly Hindu that those who do not recognize the sanctity of the Brahmin must nevertheless respect it. It is not to be resorted to against a Moslem.

Now it happens that Mr. Gandhi is *not* a Brahmin, and cannot by any means whatever attain to the status and sanctity of Brahmin. He belongs to a Vaisya caste. The numerous Vaisya castes constitute the third level in the caste system which constitutes the Hindu social order and which, properly speaking, includes about 55 to 60 per cent of the people of India.

While "sitting dharna" may provide an analogy to Mr. Gandhi's effort to blackmail the government of India, it cannot provide an explanation, because naturally everyone in India knows he has no claim to this traditional Brahmin remedy in favor of one who considers that he is the victim of oppression.

The real political parallel to Mr. Gandhi's fast would seem to be the hunger strikes indulged in by Mrs. Pankhurst and other English suffragettes of thirty-odd years ago.

CHARLES LESLEY AMES

Saint Paul, Minn.

To the Editors:

AT a recent meeting of this society's board of directors, allusion was made to our John Voelker's *Trouble-Shooter* and your review of it at the hands of Clarence Randall, another local "boy" who has made good. Mr. Randall in your review suggests that the book would have been improved by the omission of gutter-talk and such like. One of our members who is particularly well acquainted with the background of the book, and can identify many of its characters—all names being fictitious, it is well understood—observed that the book would be nothing at all were the gutter-talk left out. "Those fellows talked like that," he emphasized. Of course, you don't want to get the idea that Marquette County, the scene of the book, is really a frontier community or its mining life resembles that which Mark Twain or Bret Harte described. On the whole it is extremely sedate, settled down, law-abiding, mining having been going on here for just less than one hundred years—it is where Lake Superior iron mining, which now yields 85 per cent of all U. S. ore, began—no raw newness about it.

L. A. CHASE,
Corresponding Secretary

The Marquette County (Mich.) Historical Society

To the Editors:

I HAVE attended many bar association meetings in three states during the last five years and in each one I have noted a predominant theme, first concerning the Depression and next concerning the War; namely, THAT IF THIS COUNTRY IS GOING TO BE SAVED, THE LAWYERS ARE GOING TO HAVE TO DO IT! (Applause!!!)

Being either a humorist or a cynic, the thought will not leave my mind, "If we are so all-fired omnipotent, why in Sam Hill did we let the country get in this shape in the first place?"

I wonder if some of the brethren would like to smite me for this heresy, if it be such.

GOULD BROWN

Chicago

PROFESSIONAL ETHICS COMMITTEE

OPINION NO. 250
Filed June 26, 1943

CONFIDENCES OF A CLIENT—CANON 37—Confidential communications and disclosures made by a client to his lawyer should not be disclosed by the lawyer without the consent of the client.

CONFIDENCES OF A CLIENT—CANON 37—A lawyer may not use knowledge or information acquired by him through his professional relations with his client for his own advantage or profit; but a lawyer may make disclosures clearly necessary to obtain or defend his rights.

COLLECTING FEE—Suits to collect lawyer's fees should be avoided. Only where the circumstances imperatively require, should resort be had to a suit to compel payment.

The Committee on Professional Ethics of a local bar association has requested the opinion of this committee on the following question:

> An attorney is engaged in a free dispute with a client, who declines arbitration. The attorney has concluded that he has no alternative but to bring suit to settle the question. During his employment he received information from the client concerning the client's property, some of which is disclosed in the public records of the county and some of which is not so disclosed. The attorney is considering suing and levying an attachment, not only on property of the client, knowledge of which is a matter of public record, but also on other property of the client the nature and existence of which is known to the attorney solely through the attorney-client relationship. The attorney asks whether he would be guilty of any unprofessional and unethical conduct if he accomplished this (1) by assigning his claim for collection, and disclosing his knowledge to the attorney for the assignee; or (2) by filing the action in his own name and disclosing the facts to his attorney; or (3) by filing the action in his own name, appearing in *propria personam* and using the information directly.

The opinion was stated by MR. PHILLIPS, Messrs. Drinker, Miller, Houghton, Brown, Jackson, and Brand concurring.

Either of the suggested methods of obtaining the attachment involves disclosing the information and we deem the method adopted immaterial. The question is whether Canon 37 prohibits disclosure. The canon reads as follows:

> It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. . .
>
> If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

It will be observed that the canon first states the rule respecting confidential communications between lawyer and client in general terms, the time of its duration, and the persons it embraces.

It next states the rule with respect to employment which would involve or might involve disclosure or use of confidences.

It then recognizes certain exceptions under which disclosure is proper.

The provision respecting employment is in accord with the general rule announced in the adjudicated cases that a lawyer may not make use of knowledge or information acquired by him through his professional relations with his client, or in the conduct of his client's business, to his own advantage or profit.[1]

In *Healy* v. *Gray*, 184 Iowa 111, 168 N. W. 222, 225, the court said:

> It is also a general rule that an attorney will not be permitted to make use of knowledge or information, acquired by him through his professional relations with his client, or in the conduct of his client's business to his own advantage or profit. *Larey* v. *Baker*, 86 Ga. 468, 12 S. E. 684; *Home Inv. Co.* v. *Strange* (Tex. Civ. App.) 152 S. W. 510; *Carson* v. *Fogg*, 34 Wash. 448, 76 P. 112.
>
> The duty of an attorney to his clients is one of great delicacy and responsibility and sometimes of apparent hardship. Every consideration of personal advantage or profit must be subordinated to the interest and welfare of the client, and information derived from the close and intimate relationship necessarily existing should not be used to promote personal interests or for personal gain.

The reason underlying the rule with respect to confidential communications between attorney and client is well stated in *Mechem on Agency*, 2d Ed., Vol. 2, § 2297, as follows:

> The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosures to the attorney of the client's objects, motives and acts. This disclosure is made in the strictest confidence, relying upon the attorney's honor and fidelity. To permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance. Based upon considerations of public policy, therefore, the law wisely declares that all confidential communications and disclosures, made by a client to his legal adviser for the purpose of obtaining his professional aid or advice, shall be strictly privileged; —that the attorney shall not be permitted, without the consent of his client,—and much less will he be compelled—to reveal or disclose communications made to him under such circumstances.

However, the adjudicated cases recognize an exception to the rule, where disclosure is necessary to protect the attorney's interests arising out of the relation of attorney and client in which disclosure was made.

The exception is stated in *Mechem on Agency*, 2d Ed., Vol. 2, § 2313, as follows:

> But the attorney may disclose information received from the client when it becomes necessary for his own protection, as if the client should bring an action against the attorney

1. 7 C. J. S. § 125, p. 958; *Healy* v. *Gray*, 184 Iowa 111, 168 N. W. 222; *Baumgardner* v. *Hudson*, D. C. App., 277 F. 552; *Goodrum* v. *Clement*, D. C. App., 277 F. 586.

for negligence or misconduct, and it became necessary for the attorney to show what his instructions were, or what was the nature of the duty which the client expected him to perform. So if it became necessary for the attorney to bring an action against the client, the client's privilege could not prevent the attorney from disclosing what was essential as a means of obtaining or defending his own rights.

Mr. Jones, in his *Commentaries on Evidence*, 2d Ed., Vol. 5, § 2165, states the exception thusly:

> It has frequently been held that the rule as to privileged communications does not apply when litigation arises between attorney and client to the extent that their communications are relevant to the issue. In such cases, if the disclosure of privileged communications becomes necessary to protect the attorney's rights, he is released from those obligations of secrecy which the law places upon him. He should not, however, disclose more than is necessary for his own protection. It would be a manifest injustice to allow the client to take advantage of the rule of exclusion as to professional confidence to the prejudice of his attorney, or that it should be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights. In such cases the attorney is exempted from the obligations of secrecy.

See, also, *Mitchell* v. *Bromberger*, 2 Nev. 345, 349; *Nave* v. *Baird*, 12 Ind. 318; *Keck* v. *Boda*, 23 Ohio C. C. 413; *State* v. *Madigan*, 66 Minn. 10, 68 N. W. 179; *Olmstead* v. *Webb*, 5 App. D. C. 38; *Koeber* v. *Somers*, 84 N. W. 991, 994; *Rochester City Bank* v. *Suydam*, 5 How. Pr. 254; Thornton on *Attorneys at Law*, Vol. 1, § 127, p. 220; Weeks on *Attorneys at Law*, 2d Ed., p. 332, § 152.

As observed above, the canon states the rule as to confidential communications in most general terms. It then deals with specific applications of the general rule.

That portion of the canon dealing with employment which involves or might involve disclosure or use of a confidence is not as broad as the rule under the adjudicated cases. Likewise, the exceptions are not stated as broadly as in the adjudicated cases.

In the preamble to the Canons it is stated:

> No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

We think the language of the canon wherein it states specific applications of the general rule and of exceptions thereto is not intended to be all inclusive; rather that it was the purpose to state with particularity important applications and exceptions, and that it was not intended to exclude other well-recognized exceptions.

We are of the opinion that the lawyer may disclose confidential communications in subsequent litigation between the attorney and client where it becomes necessary so to do to protect the lawyer's rights. The general rule should not be carried to the extent of depriving the lawyer of the means of obtaining or defending his own rights.

Here, the lawyer is seeking to obtain payment of his fees. If grounds for attachment exist, and use of confidential information as to the client's property is reasonably necessary to compel the client to respond to the lawyer's just claim for a fee, then we are of the opinion that the lawyer is not inhibited by the canon from using or disclosing such information, since such disclosure is necessary to enable the lawyer to obtain his rights. The client should not be permitted to take advantage of the rule to defeat the just rights of the lawyer growing out of the lawyer-client relation.

Ours is a learned profession, not a mere money-getting trade. (See Canon 12.) Suits to collect fees should be avoided. Only where the circumstances imperatively require, should resort be had to a suit to compel payment. And where a lawyer does resort to a suit to enforce payment of fees which involves a disclosure, he should carefully avoid any disclosure not clearly necessary to obtaining or defending his rights.

OPINION NO. 251
Filed June 26, 1943

ANNOUNCEMENT CARDS—Cards announcing the opening or removing of an office may not contain statements to the effect that a lawyer intends to specialize in certain types of work or before certain tribunals other than such as are permitted by Canon 46.

ANNOUNCEMENT CARDS—Except as permitted by Canon 46, an attorney may not send out an announcement that he intends to limit his practice to a particular branch of the profession or before a particular tribunal.

The principle and limitations of Canon 27 are affirmed.

The Committee on Professional Ethics of a local bar association has asked the opinion of this committee as to the professional propriety under the canons of announcements by lawyers upon the opening or removal of an office containing statements to the effect that the lawyer intends to limit himself or specialize in certain designated types of professional work, or that he intends to devote himself exclusively or mainly to appearances before certain tribunals, administrative or otherwise. Illustrations given are such announcements stating that the lawyer will "act as 'counsel,' or as 'consultant,' or that he will 'specialize' in real estate matters or tax matters, or in trial work generally, or in a limited field, such as negligence, or that he will act as such 'counsel' or 'consultant,' or will 'specialize' in matters arising before one or more departments, bureaus, commissions, or agencies of the government, state or federal."

The question is also put as to the propriety of such announcements at the time when an attorney commences to limit himself to a particular branch of the profession.

The opinion of the committee was stated by MR. JACKSON, Messrs. Phillips, Drinker, Houghton, Brown, Miller, and Brand concurring.

Canons 27 and 46 are involved. Canon 27, as amended in August, 1942, reads as follows:

> It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment, such as furnishing or inspiring newspaper comments.

or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper.

Publication in reputable law lists in a manner consistent with the standards of conduct imposed by these canons of brief biographical and informative data is permissible. Such data must not be misleading and may include only a statement of the lawyer's name and the names of his professional associates; addresses, telephone numbers, cable addresses; branches of the profession practiced; date and place of birth and admission to the bar; schools attended, with dates of graduation, degrees and other educational distinctions; public or quasi-public offices; posts of honor; legal authorships; legal teaching positions; memberships and offices in bar associations and committees thereof, in legal and scientific societies and legal fraternities; the fact of listings in other reputable law lists; and, with their written consent, the names of clients regularly represented. A certificate of compliance with the Rules and Standards issued by the Special Committee on Law Lists may be treated as evidence that such list is reputable.

Canon 46 reads as follows:

Notice of Specialized Legal Service. Where a lawyer is engaged in rendering a specialized legal service directly and only to other lawyers, a brief, dignified notice of that fact, couched in language indicating that it is addressed to lawyers, inserted in legal periodicals and like publications, when it will afford convenient and beneficial information to lawyers desiring to obtain such service, is not improper.

Opinions 175, 194, and 228 of this committee are cited in condemning announcements of the character or type described.

Opinion 175 held it improper under Canon 27 to use a professional card reading as follows:

John Doe
Attorney at Law
Practice in the following matters only: Corporations, wills and estates, divorce practice.

In so holding the committee said:

We are of the opinion that it is not permissible to include in a simple professional card language indicating that the lawyer restricts his practice to any particular class of work not generally recognized as a specialty. Obvious examples of the latter are "Admiralty" and "Patents, Trademarks and Copyrights." Any class of work which the average lawyer is equipped and willing to handle cannot be said to be a specialty despite the fact that a lawyer may restrict himself to such a class of work and acquire an unusual degree of proficiency and experience in handling the same. Any specification of particular types of work necessarily carries an inference that unusual ability or experience is asserted and consequently noticed or advertised. The fact that the motive may be to obviate the necessity of refusing other types of work does not avoid that inference.

Nor does that restriction of the circulation of the card within approved limits evade the impropriety. Such restriction has to do only with the *use* of the card, not with its content. It is "the customary use of simple professional cards" which is permissible. What we here hold is that the card in question is not a "simple professional card" and, accordingly, that it should not be used even in the customary manner.

There is a broad distinction between the material which it is proper to include in the biographical section of an approved law list and that which properly may be included in a simple professional card. This opinion has no reference to the former.

The professional card dealt with in this opinion is a card frequently carried by lawyers to identify or introduce themselves. An announcement of opening or removing an office is not such a card and, hence, Opinion 175 is not a direct precedent, though the reasoning of the opinion would likewise condemn the proposed announcements.

In Opinion 194 the question before the committee was:

Would it be proper for a lawyer to mail to other lawyers a dignified personal letter announcing his services available in specializing in abstract and title work, exclusively for members of the bar, and referring to his particular qualifications therefor, or advertising same in an approved legal publication?

The committee, after reaffirming its Opinion 175, held under Canon 46 that the notice should relate only to a service constituting a "specialized legal service," that abstract and title work might or might not be such a service, depending upon the situation in the community in which the lawyer practiced, that the notice did not otherwise violate the canon, except the portion which described the qualifications of the lawyer. As to that the committee said:

When any such reference is included, the letter or publication of the lawyer ceases to be a brief and dignified notice and becomes an advertisement.

Here, we have the case of a lawyer opening an office for or commencing to undertake legal services in a limited field and the canon as thus construed forbids announcements of the described character, unless the announcement relates only to specialized legal service, such as admiralty, patents, trademarks and copyrights, as distinguished from branches of the profession followed by the bar at large.

Opinion 228 held that the sending of an announcement card and letter by a lawyer formerly connected with the Interstate Commerce Commission, soliciting employment in Commission matters, constitutes advertising and solicitation contrary to Canon 27 and that practice before the Commission is not a specialized legal service within the meaning of Canon 46.

The committee is unwilling to depart from these holdings. The large number and variety of requests received by the committee to classify as specialized legal service, branches of the profession which lawyers in general practice, makes it entirely clear that if the Canons as heretofore construed are not adhered to, announcements of one kind or another will be used as a means of advertisement and solicitation. The argument that the announcement is proper because it states that the lawyer's field of practice is restricted seems to us without merit, for it simply is a reverse way of emphasizing the lawyer's appraisement of his own skill and ability in a particular subject and it needs no argument to lead one to the conclusion that, by and large, the senders of such announcements

would not in fact restrict themselves to the specified field.

In the absence of an amendment to the Canons, the committee holds that under both Canons the proposed announcements are forbidden, and the prior opinions discussed are adhered to.

OPINION NO. 252
Filed June 26, 1943

LEGAL SERVICES TO REGISTRANTS UNDER THE SELECTIVE TRAINING AND SERVICE ACT OF 1940—A lawyer may properly give advice and legal assistance to a registrant with respect to his classification.

FEES FOR LEGAL SERVICES RESPECTING CLASSIFICATION UNDER THE SELECTIVE TRAINING AND SERVICE ACT OF 1940—Canon 12—Such services should be rendered as a patriotic obligation and a contribution to the war effort, without charge to the registrant.

The Committee on War Work of the American Bar Association has submitted the following questions:

(a) May an attorney who is not a member of the Selective Service organization advise a client on any legal question presented by the Selective Training and Service Act, as amended, or any of the rules promulgated thereon?

(b) May he advise a client as to what evidence would be pertinent and necessary in support of his claim for deferment?

(c) May he assist the client in procuring pertinent evidence and statistics, preparing affidavits, etc., and assembling such evidence in a manner suitable for presentation to the board or officer before whom the matter is pending?

(d) May he be permitted to file a written memorandum on behalf of his client setting forth his contentions and directing attention to parts of the record supporting these contentions, as well as to any applicable legal principles, decisions, or rules?

The opinion of the committee was stated by MR. PHILLIPS, Messrs. Drinker, Houghton, Brown, Miller, Brand, and Jackson concurring.

The organized bars have generally created committees to provide, without cost, essential legal services to registrants.

Where a registrant seeks legal advice and assistance respecting his duties, obligations, and rights under the Selective Training and Service Act of 1940, a lawyer may render such service or may refer the registrant to the local committee if one is available.

We think there is no reason why a lawyer should not advise a registrant upon any legal question arising under the Selective Training and Service Act of 1940, or the rules and regulations promulgated thereunder. He may advise a registrant as to what facts would support a claim of deferment and with respect to evidence that would establish the truth of such facts. He may assist the registrant in procuring proper evidence and in presenting it in affidavit or other proper form to the board or officer before whom the matter is pending. He may prepare and file with the board or officer before whom the matter is pending a concise memorandum in support of the registrant's claims and a brief of decisions or rulings applicable thereto.

Since the registrant may be subjected to compulsory military training and service, and the advice and legal assistance have reference to his classification under the Selective Training and Service Act of 1940, and ordinary private rights are not involved, we think the service should be rendered as a patriotic obligation and a contribution to the war effort, without charge to the registrant. *In re Arctander*, 110 Wash. 296, 188 P. 380; *In re O'Reilly*, 188 App. Div. (N.Y.) 970, 176 N.Y.S. 781. Cf. *In re Clifton*, 33 Idaho 614, 196 P. 670.

OPINION NO. 253
Filed June 26, 1943

COLLECTIONS—It is unethical for a lawyer to permit a client to send collection letters on his stationery.

A local bar association has submitted the following inquiry for the opinion of this committee:

1. Would it be ethical for an attorney, employed on a retainer or otherwise, to permit a client to send collection letters on the stationery of the attorney and apparently over his signature, to customers whose accounts had become delinquent?

(a) Would it be permissible if the client sent only a letter which had been previously outlined and prepared by the attorney with the understanding that such letter was to be used in the discretion of the client?

(b) Would it be ethical if the attorney was consulted in each case before such letter was sent out by the client?

(c) Would it be approved if the client prepared the letters and sent them to the attorney's office for his signature?

(d) If it was agreed by the client that such account would actually be sent to the attorney for collection if not satisfactorily arranged upon sending the first letter, would such agreement make the plan ethical?

The opinion of the committee was stated by MR. BROWN, Messrs. Phillips, Drinker, Houghton, Miller, Brand, and Jackson concurring.

In none of the situations set forth in the inquiry has the delinquent account been referred to the attorney for collection. Yet in each instance the evident purpose is to make the debtor believe that the account is in the attorney's hands. It is obviously unethical for a lawyer to be a party to such deception. See this Committee's Opinion No. 178.

OPINION NO. 254
Filed June 26, 1943

JUDICIAL ETHICS—It is improper for a judge to serve as director of a bank.

A member asks: Is it proper for a judge of a trial court to serve as director of a bank?

The committee's opinion was stated by MR. MILLER, Messrs. Phillips, Drinker, Houghton, Brown, Brand, and Jackson concurring.

The question must be answered in the negative.

Judicial Canon 25 provides:

> A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; . . .

A certain amount of publicity is given by all banks to the personnel of their boards of directors. Accordingly, publicity would be given to the fact that the bank had a judge on its board. This might create reasonable suspicion that the judge was utilizing the prestige of his office to persuade others to patronize the bank. The canon condemns such conduct. See Opinions 238 and 170.

BAR ASSOCIATION NEWS

Idaho State Bar

IN view of the war situation and the necessity for curtailment of travel, the Idaho State Bar held no formal meeting for 1943.

The Bar Commission, however, met on the legally appointed day and a canvass of the election in the eastern division showed the election of L. E. Glennon, Pocatello, to succeed himself as commissioner for the ensuing three years. A reorganization of the Board of Commissioners resulted in the election of Paul W. Hyatt of Lewiston as president of the Idaho State Bar for the coming year; of E. B. Smith, Boise, vice president and Sam S. Griffin of Boise was retained as secretary.

In lieu of an annual meeting, the Board of Commissioners is planning the publication of a series of papers having to do with practical legal problems in Idaho, or office problems. Jacob's *Community Property in Idaho,* which was published some twelve years ago, has been brought down to date and will be distributed to the membership shortly. It was originally prepared by Francis Jacob, then assistant professor of law at the University of Kansas, and the new annotations with comments are made by Weldon Schimke of the Moscow, Idaho, bar and assistant professor of law at the University of Idaho.

The next publication of the Idaho State Bar will probably be a reprint of Idaho statutes from the beginning, relating to conveyance of community property. This has been prepared by Carey H. Nixon of the Boise bar and is being annotated by Cleo J. Schooler of the Boise bar, and should prove to be of practical benefit, particularly in the examination of titles.

The Board of Commissioners expects also to visit each of the local bar associations some time during the coming year and to spend time with the various committees in working out the problems of the Idaho lawyer; for instance, in the field of public relations, office practice, standards of title examinations and a study of reorganization of courts, increase of judicial salaries and retirement funds.

State Bar of Texas

THE 973 Texas lawyers who attended the fourth annual meeting of the State Bar of Texas at Houston on July 1 and 2 heard four nationally famous jurists discuss the civilian lawyer's place in the war and the post-war world.

The highlight of the second day's proceedings was a resolution proposed by Angus G. Wynne of Longview, former president of the State Bar of Texas. The hotly contested resolution, which opposed the holding of a state bar office by anyone in a public office for which remuneration is received, was passed at the convention by a vote of 157 to 84. It cannot become a part of the state bar rules unless it is submitted by the Supreme Court of Texas to the 8000 lawyers of the association for a referendum.

Justice Wiley B. Rutledge, Jr., of the Supreme Court of the United States, said in his address over the radio during the annual banquet

PAUL W. HYATT
President, Idaho State Bar

July 2, "Unless some structure of law is devised and put in operation at the end of this war, there will come out of this war only another truce.

"The legal profession will have the leading share of the task of building this structure. Law is the foundation of orderly, progressive, and just society. And peace is the essential foundation of law."

Near the banquet's close, Major T. Bell of Beaumont, new president of the State Bar for the 1943 fiscal year, received the president's gavel from Claude E. Carter of Harlingen, outgoing president.

"Immediately after a period of international disorder," Bell told the attorneys, "lawyers either will gain increased respect, or their progress of the years may be erased. Through your support we expect to contribute some part to the vital national effort, and thus some aid to the cause of victory and freedom."

Volunteer civilian lawyers discussed legal aid problems of men in the military service and their possible solutions at a three-hour War Work Clinic on July 1. Col. Julien

C. Hyer, Judge Advocate of the Eighth Service Command, and George Maurice Morris, president of the American Bar Association,

MAJOR T. BELL
President, State Bar of Texas

answered questions and suggested plans for cooperative work among lawyers in that field.

In connection with charging fees to enlisted soldiers seeking legal aid from civilian lawyers, Mr. Morris said fees must be a matter of local discrimination for legal aid committees of county bar associations.

Col. Hyer pointed out that real success from the bar's legal aid system depends on cooperative working arrangements between military legal assistance officers and civilian volunteer attorneys.

Mr. Morris also spoke at one of the general sessions on "The Bar and the War."

Miss Marguerite Rawalt of Washington, D. C., president of the National Association of Women Lawyers and the Federal Bar Association, told feminine Texas lawyers at the convention that the woman's place in the post-war world depends on what she does with her opportunities today.

A resolution to Congress recommending that portions of the Internal Revenue Code be repealed was drawn up at the Taxation, Trade and Commerce Section meeting on July 1 and was passed at a general session the next day. Wright Matthews of Houston, chairman of the section, presented the resolution to the association.

Special guests at the Texas convention were four Mexican lawyers. They were Alfonso Septien, former president of the Mexican Bar Association, Javier O. Aragon, director of the association, Jorge Luna y Parra, treasurer, and Enrique Perez-Verdia, secretary.

State Bar Association of Wisconsin

THE sixty-fifth annual convention of the State Bar Association of Wisconsin was held in Milwaukee on July 25 and 26. The meeting was streamlined so as to occupy only a day and a half instead of the usual three days.

President A. J. O'Melia of Rhinelander presided at the sessions. For the president's annual address he used the thesis, "The Lawyer in the Life of Tomorrow." He expressed gratitude that his hope for an integrated bar had been at least partially fulfilled. He urged a return to fundamental principles in our thinking and said that a great responsibility rests upon the legal profession in planning for the future and that, in such planning, lawyers must take an active part.

Other numbers on the program were as follows: Provisions for Wills, Trusts and Agencies, Particularly in War Time, by George P. Ettenheim, Milwaukee; Practical Problems in the Examination of Title to Real Estate, by W. L. Woodward, Madison; The Pay-As-You-Go Tax Plan and its Procedure, by Leo Federer, Milwaukee; a Legal Clinic on "Free Legal Service to Service Men" presided over by Reginald I. Kenney, Milwaukee, Chairman of the War Legal Service Committee. At the noon luncheon on Friday the principal speaker was George E. Brand of Detroit, Michigan, whose subject was, "The Integrated Bar in Michigan." The banquet speaker was the Hon. John W. Bricker, Governor of Ohio.

President-elect Richard T. Rineholdt of Stevens Point assumed the office of president. Edmund B. Shea of Milwaukee was elected president-elect for the ensuing year and Gilson G. Glasier was reelected secretary and treasurer.

Arthur W. Kopp of Plateville, William E. Fisher, Stevens Point, and Frank T. Boesel of Milwaukee were all reelected members of the Advisory Committee on Pleading, Practice and Procedure, which corresponds to the Judicial Councils in other states.

CLASSIFIED

BOOKS

LOWEST PRICES — USED LAW BOOKS complete stock on hand, sets and texts—Law Libraries appraised and bought. NATIONAL LAW LIBRARY APPRAISAL ASSN., 538 S. Dearborn St., Chicago, Ill.

USED LAW BOOKS BOUGHT AND SOLD. State Reports, Reporter System units, Digests, Amer. Law Reports, Text-Books, Encyclopedias, etc. Correspondence solicited. R. V. BOYLE, Colcord Bldg. Oklahoma City, Okla.

WE BUY ENTIRE LAW LIBRARIES IN bulk, also fine libraries of general interest calculated to appeal to scholarly lawyers. Our buying proposition has been found singularly attractive to those who prefer selling everything at wholesale rates in one pleasant transaction. Correspondence (regarded as confidential) invited. Prompt responses. CLAITOR'S BOOK STORE, Baton Rouge, Louisiana.

WHEN YOU HAVE A DOCUMENT PROBlem of any kind send for "Questioned Documents, Second Edition," 736 pages, 340 Illustrations, $10.00 Delivered. ALBERT S. OSBORN, 233 Broadway, New York City.

LAW BOOKS BOUGHT AND SOLD: Complete libraries and single sets. CLARK BOARDMAN CO., LTD., 11 Park Place, New York City.

LAW LIBRARY FOR SALE. LARGE LAW Library including many State Reports and Texts. Send for Complete List. THE DEMING INVESTMENT COMPANY, Oswego, Kansas.

RATES

10 cents per word for each insertion minimum charge $1.20 payable in advance. *Copy should reach us by the 15th of the month preceding month of issue.*

BOOKS

LAW BOOKS — NEW — USED — BOUGHT —sold. J. M. MITCHELL, 5738 Thomas Ave., Phila., Pa.

UNITED STATES GOVERNMENT PUBLIcations at regular Government prices. No deposit—Immediate Service—Write NATIONAL LAW BOOK COMPANY, 1110—13th St. N. W., Washington, D. C.

ROBES

JUDICIAL ROBES—CUSTOM TAILORED—the best of their kind—satisfaction guaranteed—Catalog No. 41 sent on request. MCCARTHY & SIMON, INC., 7-9 West 36 St., New York, N. Y.

HANDWRITING EXPERT

EDWARD OSCAR HEINRICH, B.S., 24 California Street, San Francisco. Handwritten and typed documents scientifically explored for latent evidences determinative of their true character. For additional information see MARTINDALE-HUBBELL LAW DIRECTORY, San Francisco listings.

STAMP COLLECTIONS

WE BUY STAMPS. VALUABLE STAMP collections are sometimes found in estates, and administrators seldom know where or how to sell them to advantage. We not only make appraisal for estates, but also pay top prices for collections, accumulations and old stamps on letters. Write for our free booklet. "If You Have Stamps to Sell." H. E. HARRIS & Co. (World's Largest Stamp Firm), 108 Massachusetts Avenue, Boston, MASS.

MISCELLANEOUS

PICTURES OF THE CHIEF JUSTICES. EXcellent reproductions designed for framing. Complete set of 12, $7.50. Individual prints, $1.00. Limited supply. DEPT. F, AMERICAN BAR JOURNAL, 1140 N. Dearborn St., Chicago, Illinois.

ADMINISTRATIVE LAW SYMPOSIUM—Reprints. Complete informative analysis. 25 cents single copy. A. B. A. JOURNAL, 1140 N. Dearborn St., Chicago, Ill.

THE EXECUTIVE WHO STOPS TO THINK . . .

Knows that "10% for War Bonds isn't enough these days"

Workers' Living Costs going up . . . and Income and Victory Tax now deducted at source for thousands of workers . . .

Check! You're perfectly right . . . but all these burdens are more than balanced by *much higher* FAMILY INCOMES *for most of your workers!*

Millions of new workers have entered the picture. Millions of women who never worked before. Millions of others who never began to earn what they are getting today!

A 10% Pay-Roll Allotment for War Bonds from the wages of the family bread-winner is one thing—*a 10% Pay-Roll Allotment from each of several workers in the same family is quite another matter!* Why, in many such cases, it could well be jacked up to 30%—50% or even more of the family's *new* money!

That's why the Treasury Department now urges you to revise your War Bond *thinking*—and your War Bond *selling*—on the basis of *family* incomes. The current War Bond campaign is built around the family unit—and labor-management sales programs should be revised accordingly.

For details get in touch with your local War Savings Staff which will supply you with all necessary material for the proper presentation of the new plan.

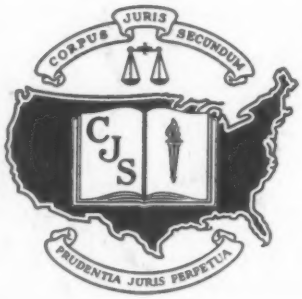
Last year's bonds got us started—*this year's bonds are to win!* So let's all raise our sights, and get going. If we all pull together, we'll put it over with a bang!

This space is a contribution to America's all-out war effort by

AMERICAN BAR ASSOCIATION JOURNAL

you've done your bit
. . . now do your best!

★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★



The picture or emblem reproduced above is symbolic of the greatest effort yet attempted to serve our Bench and Bar.

It portrays the map of the United States on which is superimposed an open book — Corpus Juris Secundum — with the burning torch of knowledge on the right-hand page, which signifies that through the knowledge gained from all the cases from all the states we have produced a work that covers all the law — from the very beginning down to date.

Above the map appears the scales of justice, emblematic of impartial administration of the law in the light of all adjudicated precedents, and above it in the scroll, CORPUS JURIS SECUNDUM, literally translated, "The Second Corpus Juris," a restatement of the whole body of the law.

Beneath the map in the scroll is written, "Prudentia Juris Perpetua" — Jurisprudence perpetuated — a true description of Corpus Juris Secundum which constitutes a permanent, complete and accurate record of the jurisprudence of our nation.

Published by

THE AMERICAN LAW BOOK CO.

[illegible]